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SUPREME COURT OF [illegible]

OCT[illegible]

[illegible]

THE NEW YORK, [illegible]
COMPANY, [illegible]

[illegible]

WALLACE ESTILL, [illegible]
R. ESTILL, AND [illegible]
E. LEONARD, [illegible]
LEONARD.

IN ERROR TO THE CIRCUIT COURT OF [illegible]
THE WESTERN DISTRICT OF [illegible]

[illegible]

RECORD, CASE No. 13,701.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 461.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

WALLACE ESTILL, HUGH W. ELLIOTT, AND WILLIAM R. ESTILL; AND LEVERETT LEONARD, CHARLES E. LEONARD, WILLIAM H. LEONARD, AND ABIEL LEONARD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

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1 UNITED STATES OF AMERICA, *ss:*

{ Seal of the United States Circuit Court for the Western District of Missouri, Central Division. }

The President of the United States to the honorable the judge of the circuit court of the United States for the central division of the western district of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the November term, 1888, thereof, between Wallace Estill, Hugh W. Elliott, and William R. Estill, plaintiffs, and The New York, Lake Erie and Western Railroad Company, defendant (No. 2023), and Leverett Leonard, Charles E. Leonard, William H. Leonard, and Abiel Leonard, plaintiffs, and The New York, Lake Erie and Western Railroad Company, defendant (No. 2024), a manifest error hath happened, to the great damage of the said The New York, Lake Erie and Western Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 20th day of November, in the year of our Lord one thousand eight hundred and eighty-eight.

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the central division of the western district of Missouri, dated as aforesaid.

H. C. GEISBERG,
Clerk Circuit Court United States, Western District of Missouri, Central Division.

Allowed by—
JNO. F. PHILIPS, *Judge.*

2 [Endorsed:] No. 2023, 2024. United States circuit court, western district of Missouri. Wallace Estill *et al.*, def'ts in error (2023), *vs.* New York, Lake Erie and Western R. R. Co., pl'ffs in error. Leverett Leonard *et al.*, def'ts in error (2024), *vs.* New York, Lake Erie and Western R. R. Co., pl'ffs in error. Writ of error to the circuit court of the United States for the western district of Missouri, central division. Returned and filed — day of ——, 187–. ——— ———, clerk.

Return to Writ.

UNITED STATES OF AMERICA,
Central Division of the Western District of Missouri, } ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled cases, together with all things concerning the same.

Seal of the United States Circuit Court for the Western District of Missouri, Central Division.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at the city of Jefferson, this 19th day of September, A. D. 1889.

H. C. GEISBERG, *Clerk.*

3 The United States of America to Wallace Estill, Hugh W. Elliott, and William R. Estill, Leverett Leonard, Charles E. Leonard, William H. Leonard, and Abiel Leonard, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the central division of the western district of Missouri, wherein The New York, Lake Erie and Western Railroad company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John F. Philips, judge of the circuit court of the United States for the western district of Missouri, this 20th day of November; in the year of our Lord one thousand eight hundred and eighty-eight.

JNO. F. PHILIPS, *Judge.*

4 [Endorsed:] United States circuit court, central division of the western district of Missouri. (2023.) Wallace Estill *et al.*, def'ts in error, *vs.* New York, Lake Erie and Western R. R. Co., pl't'ffs in error. Leverett Leonard *et al.*, def'ts in error, *vs.* New York, Lake Erie and Western R. R. Co., pl't'ff in error. Citation. Filed ——, 187–. —— ——, clerk.

UNITED STATES OF AMERICA,
Central Division of the Western District of Missouri, } ss:

We hereby acknowledge due service of the within citation this 28th day of November, A. D. 1888, and we do hereby waive any other or further citation in either of the cases of Leverett Leonard

et al. vs. The New York, Lake Erie and Western Railroad Company, and Wallace Estill *et al. vs.* the same defendants.

DRAFFIN & WILLIAMS AND
COSGROVE & JOHNSTON,
Attorneys for Defendants in Error.

5 UNITED STATES OF AMERICA,
Central Division of the Western District of Missouri, } *sct:*

Pleas before the honorable circuit court of the United States in and for the central division of the western district of Missouri at the April term, A. D. 1888, thereof, in the cases of—

WALLACE ESTILL *et al.*
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY } (No. 2023.)

and

LEVERETT LEONARD *et al.*
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

Be it remembered that heretofore, to wit, on the 17th day of February, A. D. 1887, it being in vacation of the circuit court of the United States in and for the eastern division of the western district of Missouri, the following proceedings were had, to wit:

Filing of Transcript and Other Papers.

WALLACE ESTILL *et al.*
vs.
N. Y., LAKE ERIE AND W. R'Y CO.

This day there is received and filed herein a transcript of the record entries as certified from the U. S. circuit court for the western division of the western district of Missouri; also transcript of record
& proceedings in Saline circuit court, motion to quash writ,
6 bill of exceptions to motion, motion for new trial, and a stipulation of counsel transferring case to the U. S. circuit court for the eastern division of the western district of Missouri.

Transcript of the record entries as certified from the United States circuit court for the western division of the western district of Missouri, at Kansas City, is in words and figures following, to wit:

UNITED STATES OF AMERICA, *sct:*

Transcript of Record Entries & Proceedings in Western Division.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

Transcript Filed.

THURSDAY, *May 15th, A. D.* 1884.—In vacation.

WALLACE ESTILL *et al.*
against
N. Y., L. E. & W. R'Y Co. } 815.

This day there is received and filed herein a transcript of record from the circuit court of — county on change of forum.

Motion to Quash Submitted.

WEDNESDAY, *May 28th*, 1884.

WALLACE ESTILL *et al.*
against
NEW YORK, LAKE ERIE & WESTERN R'Y Co. } 815.

This day come the parties, by their attorneys, and the motion to quash the writ herein being called for hearing is argued by
7 counsel and submitted to the court and taken under advisement.

Motion to Quash Summons & Return Overruled.

THURSDAY, *May 29th*, 1884.

WALLACE ESTILL *et al.*
against
THE NEW YORK, LAKE ERIE AND WESTERN RAILWAY Co. } 815.

The motion to quash herein having been submitted, it is now ordered that the same be denied.

Answer Filed.

THURSDAY, *July 17th, A. D.* 1884.—In vacation.

WALLACE ESTILL *et al.*
against
NEW YORK, LAKE ERIE & WESTERN RAILWAY Co. } 815.

This day comes the defendant, by Garland Pollard, Esq., its solicitor, and files answer herein.

Continuance.

WEDNESDAY, *November* 12*th*, 1884.

WALLACE ESTILL *et al.*
against } 815.
N. Y., L. E. & W. R'Y Co.

Ordered that this cause be continued.

Continuance.

FRIDAY, *May* 22*nd*, 1885.

WALLACE ESTILL *et al.*
against } 815.
NEW YORK, LAKE ERIE & WESTERN R'Y Co.

Ordered that this cause be continued.

Case Called, Jury Sworn, Hearing of Evidence.

October Term, 1885.

WEDNESDAY, *November* 4*th*, 1885.

8 WALLACE ESTILL *et al.*
against } 815.
N. Y., L. E. & W. R'Y Co.

and

LEVERETT LEONARD *et al.*
against } 816.
N. Y., L. E. & W. R'Y Co.

This day come the parties, by their attorneys—the plaintiffs, by Wm. N. Williams and John Cosgrove, and the defendant, by Garland Pollard—and, these cases being called for trial, it is ordered that a jury come, to wit: D. M. Jarboe, John N. North, J. L. Petty, Joseph Hoblitzell, John L. Cole, Isaac T. Hosea, Herschel Bartlett, Addison Payne, George G. Stevenson, Enoch Dean, W. H. Bean, and D. F. Torbitt, twelve good and lawful men, who are duly sworn to try the issues joined and, the hour of adjournment having now arrived, it is ordered that further proceedings be postponed until tomorrow morning.

Further Hearing of Evidence.

THURSDAY, *November 5th*, 1885.

WALLACE ESTILL *et al.*
against
N. Y., L. E. & W. R'Y Co.

and

LEVERETT LEONARD *et al.*
against
N. Y., L. E. & W. R'Y Co. } 816.

This day again come the parties, by their attorneys, and
9 the jury sworn to try this cause as on yesterday; and thereupon, for good cause shown to the court, it is ordered that Enoch Dean, one of the jurors empanelled and sworn to try this cause on yesterday, be excused from the further consideration of the same; and, by consent of counsel for both plaintiffs and defendant, it is ordered that the panel be completed from the general panel. Thereupon Webster Withers is called, chosen, and sworn to try the issues in substitution for the said Enoch Dean; thereupon the hearing of evidence is proceeded with and, not being completed at the hour of adjournment, it is ordered that further proceedings be postponed until to-morrow morning.

Further Hearing of Evidence.

FRIDAY, *November 6th*, 1885.

WALLACE ESTILL *et al.*, LEVERETT LEONARD *et al.*
against
N. Y., L. E. & W. R'Y Co. } 815, 816.

This day again come the parties, by their attorneys, and the jury sworn to try this cause as on yesterday; thereupon the hearing of evidence is proceeded with and, not being concluded at the hour of adjournment, it is ordered that further proceedings be postponed until to-morrow morning.

Further Hearing of Evidence.

SATURDAY, *November 7th*, 1885.

WALLACE ESTILL *et al.*, LEVERETT LEONARD *et al.*
10 *against*
N. Y., L. E. & W. R'Y Co. } 815, 816.

This day again come the parties, by their attorneys, and the jury sworn to try this cause as on yesterday; thereupon the hearing of evidence is proceeded with and, not being completed at the hour of adjournment, it is ordered that further proceedings be postponed until Monday morning.

Further Hearing of Evidence.

MONDAY, *November 9th*, 1885.

WALLACE ESTILL *et al.*
against
N. Y., L. E. & W. R'Y Co. } 815.

and

LEVERETT LEONARD *et al.*
against
N. Y., L. E. & W. R'Y Co. } 816.

This day again come the parties, by their attorneys, and the jury sworn to try this cause as on Saturday last; thereupon the hearing of evidence is continued and, not being completed at the hour of adjournment, further proceedings are postponed until to-morrow morning.

Argued by Counsel.

TUESDAY, *November 10th*, 1885.

WALLACE ESTILL *et al.*, LEVERETT LEONARD *et al.*
against
N. Y., L. E. & W. R'Y Co. } 815, 816.

11 This day come again the parties, by their attorneys, and the jury sworn to try this cause as on yesterday; thereupon the hearing of evidence is concluded, arguments of counsel are had, and further proceedings are postponed until to-morrow morning.

Verdict and Judgment.

WEDNESDAY, *November 11th*, 1885.

WALLACE ESTILL *et al.*
against
N. Y., L. E. & W. R'Y Co. } 815.

This day again come the parties, by their attorneys, and the jury sworn to try this cause, as on yesterday; thereupon, after hearing the charge of the court, the jury retire to consider what verdict they shall render in the premises, and after due consideration return into court the following verdict, to wit:

"We, the jury, find for the plaintiffs, Estill & Elliott, and assess their damages at five thousand five hundred and twenty-five dollars, and six per cent. interest from November 21st, 1883—interest, $653.79.

D. M. JARBOE, *Foreman.*"

It is therefore considered by the court that the plaintiffs, Wallace Estill, Hugh W. Elliott, and William R. Estill, recover against the defendant The New York, Lake Erie and Western Railroad Company the sum of six thousand one hundred seventy-eight dollars and seventy-nine cents ($6,178.79) so found to be due, with their costs, and have thereof execution.

Motion for New Trial Filed.

And now again comes defendant, by attorney, and files motion for a new trial in this cause.

12 *Motion for New Trial Submitted.*

MONDAY, *January 4th*, 1886.

WALLACE ESTILL *et al.*
against
N. Y., L. E. & W. R'Y Co. } 815.

This day come the parties, by their attorneys—the plaintiffs by Messrs. John Cosgrove and Wm. N. Williams, and the defendant by Garland Pollard—and, the motion for new trial in the above-entitled cause coming on for hearing, the same is argued by counsel and submitted to the court on briefs and abstracts to be filed.

Motion for New Trial Sustained.

MONDAY, *February 1st*, 1886.

WALLACE ESTILL *et al.*
against
N. Y., L. E. & W. R'Y Co. } 815.

The motion of defendant for a new trial of this cause having been heretofore submitted to the court and taken under advisement, now, the premises having been duly considered and the court, being fully advised concerning the same, doth order that said motion be granted, and that the verdict and judgment heretofore entered in this case be set aside and for naught held, and that a new trial of this case be had.

October Term, 1886.

MONDAY, *December 13th, A. D.* 1886.

13 WALLACE ESTILL *et al.*, LEVERETT LEONARD *et al.*
against
NEW YORK, LAKE ERIE AND WESTERN RAILWAY CO. } 815, 816.

In pursuance of a stipulation of parties this day filed, which stipulation is in words and figures as follows, to wit:

Stipulation Transferring Case to Eastern Division.

"In the Circuit Court of the United States, Western Division of the Western District of Mo., October Term, 1886.

WALLACE ESTILL *et al.* and LEVERETT LEONARD *et al.*, Plaintiffs,
vs.
THE NEW YORK, LAKE ERIE AND WESTERN R'Y Co., Defendants.
} Nos. 815 & 816.

It is hereby stipulated and agreed by the parties to the above-entitled suits that the same may be transferred to the eastern division of the western district of Missouri for trial, and that the clerk of this court shall transfer the depositions and all of the original papers in said causes to said eastern division of the western district, and that the same shall be placed on the docket for trial at the next term of this court for the eastern division of the western district of Mo., at Jefferson City, and no question shall be raised as to the jurisdiction of the court to which these cases are to be transferred at Jefferson City which could not be raised to the jurisdiction of this court and no question as to the jurisdiction of this court shall be waived.

DRAFFEN & WILLIAMS,
COSGRAVE & JOHNSTON,
14 O. GUITAR, BOYD & SEBREE,
Att'ys for Pl'ffs.
POLLARD & WERNER,
Att'ys for Def'ts."

Order of Transfer.

It is ordered by the court that these cases be transferred to Jefferson City for trial, and that the clerk of this court transfer the papers in these cases, together with a certified transcript of all the record entries in said cases, to the clerk of the United States circuit court for the eastern division of the western district of Missouri, at Jefferson City, Mo.

Certificate.

UNITED STATES OF AMERICA, *sct:*

I, H. C. Geisberg, clerk of the circuit court of the United States for the western division of the western district of Missouri, do hereby certify that the foregoing is a true and complete transcript of the record entries in the cause therein named as fully as the same appear of record in my office, at Kansas City, Mo.

Witness my hand as clerk and the seal of said court.

Done at office, in Kansas City, Mo., this 8th day of January, A. D. 1887.

H. C. GEISBERG, *Clerk*,
By WARREN WATSON,
Deputy Clerk.

Transcript from the Saline county circuit court, filed as aforesaid, is in the words and figures following, to wit:

15 *Transcript from Saline Co. Circuit Court.*

STATE OF MISSOURI, } ss:
County of Saline, }

Pleas before the circuit court of Saline county, at the city of Marshall, State and county aforesaid, before the Hon. John P. Strother, judge of the sixth judicial circuit of the State of Missouri, in the cause wherein Wallace Estill, Hugh W. Elliott, & William R. Estill are plaintiffs against The New York, Lake Erie and Western Railway Company, def'ts.

Be it remembered that on the 21st day of November, A. D. 1883, a petition and bond was filed in the above-entitled cause in the office of the clerk of the circuit court in and for the county of Saline; which said petition is in words and figures following, to wit:

Petition.

In the Circuit Court of Saline County, Missouri, February Term, 1884.

WALLACE ESTILL, HUGH W. ELLIOTT, and WILLIAM R. ESTILL, Plaintiffs,
vs.
THE NEW YORK, LAKE ERIE & WESTERN R. R. Co., Def'ts.

Plaintiffs state that on the 12th day of September, 1883, they were the owners of seventy head of imported polled Angus or Aberdeen cattle, which they had imported at great costs and expenses from Scotland and which were of the value of thirty-five thousand
16 dollars.

That said cattle were intended for the Missouri market, and defendant had full knowledge of the value of said cattle and the purposes for which they were intended.

That defendant is now and was on said 12 day of September a railroad corporation, duly organized, created, and existing according to law, and as such was engaged in running and operating a railroad through the States of New York and Ohio, and was a common carrier of live stock and other freights over the line of its said railroad in said States.

That on or about said 12 day of September plaintiffs delivered to defendant as such common carrier, to be transported over its line of

railway, the said seventy head of imported cattle, and defendant received such cattle as such common carrier, well knowing the value and character of same and the importance of transporting them with care and reasonable dispatch.

That upon the receipt of said cattle by defendant as such common carrier it undertook and became bound to transport them safely over its said railway and to deliver them at the terminus thereof within a reasonable time after said cattle were delivered to and received by it.

That plaintiffs paid the usual and customary freight and
17 charges for transporting said cattle over defendant's said railway.

That defendant, in utter disregard and in violation of its duty as such common carrier, failed and neglected to transport said cattle over its said road, as was its duty to do, with reasonable dispatch and safety, but, on the contrary thereof and on or about the 16 day of September aforesaid, at Mankin, in the State of Ohio, by its agents, servants, and employees, negligently, carelessly, and unskillfully run its train of cars upon which plaintiffs' said cattle were being transported over its said road into another train of cars with great force, speed, violence, and by reason thereof broke a large number of the cars in which said cattle were and threw said cattle violently and forcibly against the cars and each other and greatly jarred, bruised, and maimed, wounded, and injured them.

That a large number of said imported cattle were cows in calf at the time said accident and collision occurred, to wit, fifty-five head, and that about twenty of them have since said collission and accident and in consequence thereof prematurely lost their calves.

That said cattle were detained at the place of said accident for about thirty-six hours after the same occurred without suitable feed, water, or attention, and in consequence of which they were greatly reduced in value and damaged.

That plaintiffs have in consequence of the injuries received
18 by said cattle as aforesaid been put to great trouble and expense in caring for them, and the value of said cattle greatly reduced and depreciated.

That by reason of the premises the plaintiffs have sustained damages in the sum of twelve thousand dollars, and for which sum and costs of suit they ask judgment.

DRAFFEN & WILLIAMS,
COSGROVE & JOHNSTON,
Att'ys for Plaintiffs.

STATE OF MISSOURI, } ss :
County of Jackson, }

Wallace Estill, one of the plaintiffs in the above-entitled cause, being duly sworn, upon his oath says that the plaintiffs have a just demand against the defendant, and that the amount which the affiant believes the plaintiffs ought to recover after allowing all just credits and set-offs is twelve thousand dollars, and that the defendant is a corporation whose chief office of place of business is out of

this State, and that the defendant is a corporation incorporated by a State other than the State of Missouri.

WALLACE ESTILL.

Subscribed and sworn to before me this 17th day of November, 1883. My commission expires as a notary public Dec. 7th, 1884.

[L. S.] WILLIAM K. HAWKINS,

19 *Notary Public, Jackson County, Mo.*

And said bond filed on said 21st day of November, 1883, is in words and figures as follows, to wit:

Bond.

WALLACE ESTILL *et al.*, Plaintiff-, *against* NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, D'f't. } Attachment Bond in Civil Case.

We, Wallace Estill and Wm. R. Estill, as principals, and L. Leonard and W. H. Leonard, as sureties, acknowledge ourselves to be indebted to the State of Missouri in the sum of twenty-four thousand dollars; for the payment whereof we bind ourselves, our heirs, executors, and administrators.

The condition of the above obligation is such that whereas Wallace Estill, Hugh W. Elliott, and Wm. R. Estill, as plaintiffs, are about to commence a suit by attachment in the circuit court of Saline county, Missouri, against The New York, Lake Erie and Western Railroad Company, defendant, returnable to the next February term thereof, wherein the sum sworn to is twelve thousand dollars:

Now, therefore, if the plaintiffs shall prosecute their action without delay and with effect, refund all sums of money that may be adjudged to be refunded to the defendant or found to have been received by plaintiffs and not justly due to them, and pay all damages and costs that may accrue to any defendant or garnishee by
20 reason of the attachment or any process or proceeding in the suit or by reason of any judgment or process thereon, then this obligation is to be void; otherwise to remain in full force.

Witness our hands and seals this 20th day of November, A. D. 1883.

WALLACE ESTILL. [SEAL.]
WM. R. ESTILL. [SEAL.]
L. LEONARD. [SEAL.]
W. H. LEONARD. [SEAL.]

Approved this 21st day of November, 1883.

G. W. LANKFORD,
By E. T. OREAR, *D. C.*

And afterwards, to wit, on the 21st day of November, A. D. 1883, writ of attachment was issued by the clerk of this court and delivered into the hands of the sheriff of Saline county, which is in words and figures as follows, to wit:

Attachment to Sheriff of Saline County.

STATE OF MISSOURI, }
County of Saline. }

OFFICE OF CIRCUIT CLERK.

The State of Missouri to the sheriff of Saline county, Greeting:

We command you to attach the New York, Lake Erie and Western Railroad Company by all and singular its lands and tenements, goods, chattels, moneys, credits, evidences of debt, and effects, or so much thereof as shall be sufficient to secure the sum of twelve thousand dollars and with interest and costs of suit, in whose hand or possession soever the same may be found, and that you sum-
21 mon the said New York, Lake Erie and Western Railroad Company that they be and appear at the next term of the circuit court, before the judge thereof, on the 1st day of said term to be holden at the city of Marshall and State of Missouri, within and for the county of Saline, on the 2nd Monday of February next, and then and there to answer the complaint of Wallace Estill, Hugh W. Elliott, and Wm. R. Estill, as set forth in the annexed petition; and also that you summon all and every person in whose hand or possession soever any personal property, rights, goods, chattels, moneys, credits, evidences of debt, or effects may be found or who may be named by the plaintiffs or their attorney as garnishee, and particularly that they be and appear before the judge of our said court on the first day of the term aforesaid, then and there to answer unto what may be objected against them; and have you then and there this writ.

Witness G. W. Lankford, clerk of our said circuit court, and the seal thereof hereunto affixed, at office, in Marshall, this 21st
[L. S.] day of November, in the year of our Lord one thousand eight hundred and eighty-three.

G. W. LANKFORD,
Circuit Clerk,
By E. G. OREAR, *Deputy.*

22 And upon the back of said writ the sheriff of said county made his return in words and figures as follows, to wit:

Sheriff's Return.

Served the within writ by making search for property belonging to the within-named railroad company, and, failing to find anything on which to levy, return the same unsatisfied.

Done in Saline county, Missouri, this Feb'y 11th, 1884.

Fee, *nulla bona*	50
Expenses to K. C.	6 25
Total	6 75

R. W. HICKMAN,
Sheriff Saline County,
By JOHN R. CASON, *D. S.*

And afterwards, to wit, on the 21st day of November, A. D. 1883, there was issued from said office a writ of attachment in this said cause directed to the sheriff of the city of St. Louis; which said writ is in words and figures as follows, to wit:

Attachment to Sheriff of the City of St. Louis.

STATE OF MISSOURI, }
County of Saline. }

OFFICE OF CIRCUIT CLERK.

The State of Missouri to the sheriff of the city of St. Louis, Greeting:

We command you to attach the New York, Lake Erie and Western Railroad Company by all and singular their lands, tene-
23 ments, goods, chattels, moneys, credits, evidences of debt, and effects, or so much thereof as shall be sufficient to secure the sum of twelve thousand dollars, with interest and costs of suit, in whose hand or possession soever the same may be found, and that you may summon the said New York, Lake Erie and Western Railroad Company that they be and appear at the next term of the circuit court, before the judge thereof, on the first day thereof of said term to be holden at the city of Marshall and State of Missouri, within and for the county of Saline, on the 2nd Monday of February next, and then and there to answer the complaint of Wallace Estill, Hugh W. Elliott, & Wm. R. Estill, as set forth in the annexed petition.

And also that you summon all and every person in whose hand or possession soever any personal property, rights, goods, chattels, mortgages, credits, evidences of debt, or effects may be found or who may be named by the plaintiffs or their attorney as garnishee, and particularly that they be and appear before the judge of our said circuit court on the first day of the term aforesaid, then and there to answer unto what may be objected against them; and have you then and there this writ.

Witness G. W. Lankford, clerk of our said circuit court,
[L. S.] and the seal thereof hereunto affixed, at office, in Marshall,
this 21st day of November, in the year of our Lord one thou-
24 sand eight hundred and eighty-three.

G. W. LANKFORD,
Circuit Clerk,
By E. T. OREAR, *Deputy.*

And upon the back of said writ is endorsed the following sheriff's return, to wit:

"Sheriff's Return."

Executed this writ in the city of St. Louis on the 7th day of January, 1884, by delivering a copy of the writ and petition, as furnished by clerk of circuit court of Saline county, to W. E. Conner, city passenger agent of The New York, Lake Erie and Western R. R. Co.,

the within-named defendant, who was in its business office and had charge thereof at the time of said service. The president or any other chief officer of said defendant could not be found in the city of St. Louis at the time of said service.

ISAAC M. MASON,
Sheriff — the City of St. Louis,
By M. W. KOTOVSKY, *D'p'ty.*

Fees, $1.00, paid by plaintiffs.

And afterwards, to wit, on the 11th day of February, it being the first day of the regular February term of said circuit court of Saline county, Missouri, there was filed in this cause a petition and bond by defendant; which petition is in words and figures as follows, to wit:

25 *Petition for Removal.*

In the Circuit Court of Saline County, State of Missouri.

WALLACE ESTILL, HUGH W. ELLIOTT, WILLIAM R. ESTILL, Plaintiffs, *vs.* NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant.	Petition for Removal to the Circuit Court of the United States for the Western Division of the Western District of Missouri.

Suit in attachment.

To the honorable the circuit court of Saline county, State of Missouri:

Your petitioners, the New York, Lake Erie and Western Railroad Company, appearing only for the purpose of making this application, respectfully shows unto this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars; that the controversy in said suit is between citizens of different States, and that the petitioner was at the time of the commencement of this suit and still is a corporation organized under the laws of the State of New York and a citizen of that State, and that the said plaintiffs, Wallace Estill, Hugh W. Elliott, and William R. Estill, were then and still are citizens of the State of Missouri, and your petitioner offers herewith a good and sufficient surety for its entering in said
26 circuit court of the United States in and for the western division of the western district of Missouri, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by the said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And it prays this honorable court to proceed no further herein, except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into the said circuit court of the United States for the west-

ern division of the western district of Missouri; and it will ever pray.

NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, *Petitioners*,
By H. J. JEWITT, *Its President*.

STATE OF MISSOURI, } ss:
County of Saline, }

I, Garland Pollard, being first duly sworn, on oath do say that I am the attorney for the said petitioners in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements therein contained are true, as I verily believe.

(Signed) GARLAND POLLARD.

Subscribed and sworn to before me by the said Garland Pollard this 11th day of Febr'y, A. D. 1884.

27 G. W. LANKFORD, *Clerk*,
By E. T. OREAR, *D. C.*

And said bond is in words and figures as follows, to wit:

Bond for Removal.

Know all men by these presents that the New York, Lake Erie and Western Railroad Company, as principal, and P. H. Rea, of Marshall, in the county of Saline and State of Missouri, as surety, are held — firmly bound unto Wallace Estill, Hugh W. Elliott, and William R. Estill in the penal sum of one thousand dollars, lawful money of the United States; for the payment of which, well and truly — made, we bind ourselves and our heirs, executors, or administrators, jointly and severally and firmly, by these presents.

Witness our hands and seals this 11th day of February, A. D. 1884.

The condition of this obligation is such that if the above-bounden New York, Lake Erie and Western Railroad Company shall enter and file or cause to be entered and filed in the next circuit court of the United States in and for the western division of the western district of Missouri on the first day of its next session copies of all process, pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the circuit court of Saline county, State of Missouri, in which Wallace Estill, Hugh
28 W. Elliott, & William Estill are plaintiffs and The New York and Lake Erie and Western Railroad Company defendant, and shall pay all costs that may be awarded by said United States court if said court shall hold that such suit was wrongfully or improperly removed thereto, and do such other appropriate acts as by the act of Congress in that behalf are required to be done

upon the removal of such suit from said State court into — United States court, then this obligation to be void; otherwise of force.

NEW YORK, LAKE ERIE AND WEST-
[L. S.] ERN RAILROAD COMPANY, [SEAL.]
By H. J. JEWITT, *Pres't.* [SEAL.]
P. H. REA. [SEAL.]

Attest: A. P. MULDONOUGH, *Secretary.*

And on said 11th day of February, A. D. 1884, at said first day of said February term of said circuit court, the following entry was made of record—that is to say:

Order for Removal.

WALLACE ESTILL *et al.*, Plaintiffs,
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant.

And now, at this day, comes the defendant, by attorney, and files herein petition, application, and bond for a removal of this
29 cause to the circuit court of the United States; said bond is examined and approved, application heard and granted, and it is ordered that this cause be removed to the circuit court of the western division of the western district of Missouri, and the clerk of this court is ordered to proceed without delay to make a full and complete transcript of the record and proceedings in this cause and transmit the same, together with all the original papers not forming a part of the record herein, to the clerk of said court at Kansas City.

Clerk's Certificate.

STATE OF MISSOURI, } ss:
County of Saline, }

I, George W. Lankford, clerk of the circuit court within and for the county and State aforesaid, hereby certify that the above and foregoing is a full, true, and complete transcript of the proceedings and record in the case wherein Wallace Estill *et al.* are plaintiffs and The New York, Lake Erie and Western Railroad Company is defendant, as the same is of record and on file in my office.

Witness my hand as clerk of said court, with the seal of
[SEAL.] my said office, at the city of Marshall, Mo., this 15th day of February, A. D. 1884.

G. W. LANKFORD, *Clerk,*
By E. T. OREAR, *Deputy.*

30 *Bill of Costs.*

G. W. Lankford, cl'k c't Saline Co., Mo.

Filing, 10; writs attch., 2.00; 2 copies writ, 20	2 30	
4 copies pet., 6.00; 8 crs., 4.00	10 00	
Dock., 10; 1 order, 30; app., 20	60	
Approving bond, 50	50	
		13 40

R. W. Hickman, sh'ff Saline Co.

Return writ	50

Isaac Mason, sh'ff St. Louis.

Serving 1 writ, 1.00; p'd by pl'ff, 1.00	
	$13 90

I certify the above costs to be correctly taxed, and, further, that none of the same has been paid except as stated.

Attest: G. W. LANKFORD,
By E. T. OREAR, *D. C.*

The motion to quash the "writ of summons" and the sheriff's return thereon, filed as aforesaid, are in the words and figures following, to wit:

(See bill of exceptions. See page 31 of this record.)

31 The bill of exceptions to the ruling of the court on motion to quash writ of summons filed as aforesaid is in words and figures as follows, to wit:

Bill of Exceptions.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, May Term, 1884.

WALLACE ESTILL, HUGH W. ELLIOTT, & WILLIAM R. ESTILL, Plaintiffs, *vs.* NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant.	Removal from Saline Circuit Court. Attachment.

Be it remembered that at the May term of said court the defendant entered a special appearance in the above cause and filed its motion to quash the writ of summons issued to the sheriff of the city of St. Louis in the above cause and the return of said sheriff thereon; which said motion is in words and figures following—that is to say:

Motion to Quash.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, May Term, 1884.

WALLACE ESTILL, HUGH W. ELLIOTT, & WILLIAM R. ESTILL, Plaintiffs,
vs.
NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant.

Attachment Removed from the Circuit Court of Saline County.

32 And now comes the said defendant and, appearing specially and only for the purpose of making this motion, moves the court to quash the writ of summons issued to the sheriff of the city of St. Louis in this case and the return of the said sheriff thereon, on the ground that the said writ and return are void and confer no jurisdiction over defendant for the following reasons appearing on the face of the record:

1. Defendant, being a foreign railroad corporation operating a railroad in the States of New York and Ohio, which does not terminate opposite any point in the State of Missouri, cannot be brought into the courts of Missouri by writ of summons.

2. The cause of action sued on did not accrue in Saline county, where this suit was instituted, and the business office of defendant at the time of the alleged service was not in that county.

3. The record fails to show that at the time of said service or at any time defendant was engaged in business in the State of Missouri.

NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY,
By GARLAND POLLARD,
Its Att'y Specially for the Purpose of this Motion.

But the court overruled the said motion; to which order and decision of the court overruling said motion the defendant then and there excepted; and, inasmuch as the matters aforesaid do not appear of record, the counsel for the defendant presents this bill
33 of exceptions and prays that the same may be signed and sealed by the court and made a part of the record in said cause, and it is done accordingly.

DAVID J. BREWER, *Judge.* [SEAL.]

The answer filed as aforesaid is in words and figures following, to wit:

Answer.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, May Term, 1884.

WALLACE ESTILL *et al.*, Plaintiffs,
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant.
} Attachment Removed from the Saline Circuit Court.

And now comes the said defendant and denies all the allegations of the plaintiffs' petition, and now, having fully answered, defendant asks to be discharged with its reasonable costs.

By GARLAND POLLARD, *Its Att'y.*

The motion for new trial, filed as aforesaid, is in words and figures as follows, to wit:

Motion for New Trial.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, *ss*, October Term, 1885.

WALLACE ESTILL *et al.*
vs.
NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.
} Removal from State Court.

Motion for new trial.

And now comes the said defendant and moves the court to set aside the verdict of the jury and to grant a new trial in the above case on the groundsand for the reasons following: 1, the court gave improper instructions to the jury; 2, the court refused proper
34 and legal instructions asked by defendant; 3, the court admitted improper and incompetent evidence offered by plaintiff against the objection of defendant; 4, the court rejected proper and competent evidence offered by defendant; 5, the verdict is against the law; 6, the verdict is contrary to the evidence and against the weight of evidence; 7, the damages are excessive; 8, the court erred in overruling defendant's motion to quash the return of service on the summons by the sheriff in this case.

G. POLLARD,
Att'y for Def't.

The stipulation transferring case to the eastern division, filed as aforesaid, is in words and figures following, to wit:

Stipulation Transferring Cause to Eastern Division.

In the Circuit Court of the U. S., Western Division of the Western District of Missouri, October Term, 1886.

WALLACE ESTILL *et al.* and LEVERETT LEONARD *et al.*, Plaintiff-,
vs.
THE NEW YORK, LAKE ERIE AND WESTERN R'Y CO., Defendants.
} Nos. 815 & 816.

It is hereby stipulated and agreed by the parties to the above-entitled suits that the same may be transferred to the eastern division of the western district of Missouri for trial, and that the clerk of this court shall transfer the depositions and all of the original papers in said causes to said eastern division of the western district, and that the same shall be placed on the docket for trial at the next term of this court for the eastern division of the western district of Mo., at Jefferson City, and no question shall be raised as to the jurisdiction of the court to which these cases are to be transferred at Jefferson City which could not be raised to the jurisdiction of this court, and no question as to the jurisdiction of this court shall be waived.

DRAFFEN & WILLIAMS,
COSGROVE & JOHNSTON,
O. GINTOR, BOYD & SEBREE,
Att'ys for Pl'ff.
POLLARD & WERNER,
Att'ys for Def't.

35 And afterwards, at a regular stated term of said circuit court, begun and held at the city of Jefferson, in said district, on the third Monday of April, A. D. 1887, the following further proceedings were had in this cause on the 19th day of April, A. D. 1887, to wit:

Continuance.

WALLACE ESTILL *et al.*
vs.
N. Y., L. E. & W. R'Y Co.

On motion of plaintiffs, it is ordered that this case be continued until the next term of this court.

And afterwards, at a regular stated term of said circuit court, begun and held at the city of Jefferson, in said district, on the third Monday of November, A. D. 1887, the following further proceedings were had in this cause on the 29th day of November, A. D. 1887, to wit:

Continuance.

WALLACE ESTILL *et al.*
vs.
N. Y., L. E. & W. R'Y CO.

By consent of parties it is ordered that this case be now continued until the next term of this court.

And afterwards, on the 27th day of March, 1888, there was filed in the clerk's office of said circuit court the following certificate and order, designating and appointing Honorable Amos M. Thayer, district judge of the eastern district of Missouri, to hold the courts and discharge the judicial duties of the resident district judge in the western district of Missouri during the disability of said judge:

UNITED STATES OF AMERICA, *sct:*

36 *Certificate as to Disability of District Judge.*

I, Henry C. Geisberg, clerk of the circuit court of the United States for the central division of the western district of Missouri, do hereby certify that the Honorable Arnold Krekel, district judge for said district, is prevented by disability from holding the stated April term, 1888, of the circuit court of the United States for the central division of the western district of Missouri, and the adjourned session of the district court of said division and district, appointed to be held on the third Monday of April, 1888, and that the justice of the Supreme Court of the United States allotted to the eighth circuit and the circuit judge of said circuit are absent.

In testimony whereof I have hereunto set my hand and [SEAL.] affixed the seal of said circuit court, at the city of Jefferson, in said district, this 24th day of March, A. D. 1888.

H. C. GEISBERG, *Clerk.*

UNITED STATES OF AMERICA, *sct:*

Order Appointing Honorable A. M. Thayer, Judge of the Eastern District of Missouri, to Hold Courts.

It appearing from the above certificate of the clerk of the circuit court of the United States for the central division of the western district of Missouri that the district judge of said district is disabled from holding the stated April term, 1888, of said circuit court and adjourned session of the district court for said district and division, appointed to be held on the third Monday of April, 1888, and it appearing that public interest so require, I do hereby designate and appoint the Hon. Amos M. Thayer, district judge for the
37 eastern district of Missouri, to hold the said courts or aid in holding the same and discharge all the judicial duties of the judge so disabled during such disability.

Witness my hand, at chambers, at St. Louis, Mo., this 26 day of March, A. D. 1888.

DAVID J. BREWER,
Circuit Judge.

Afterwards, at a regular stated term of said circuit court, begun and held at the city of Jefferson, in said district, on the third Monday of April, 1888, and on the 26th day of April, there was present and presiding Hon. Amos M. Thayer, district judge for the eastern district of Missouri; and on said last-named day the following proceedings were had, to wit:

Cases Called for Trial; Jury Sworn; Hearing of Evidence.

WALLACE ESTILL *et al.*
vs.
N. Y., L. E. & W. R'Y Co.

This day come the parties, by their respective attorneys, the plaintiffs by Mess. Wm. M. Williams and John Cosgrove and the defendant by Mess. Garland Pollard and Percy Werner, and, this case being regularly called for trial and both parties being ready, it is ordered that a jury come, to wit, W. W. Hockman, I. M. Greer, Samuel Grant, Benjamin Jones, Peter Willis, S. M. Meng, Henry Burger, Louis Wolferman, W. H. Davis, L. C. Isom, Joseph Talbott, and John Knight, twelve good and lawful men, who were duly sworn well and truly to try the issues herein joined.

Thereupon evidence is heard and, not being concluded at the hour of adjournment, it is ordered that further proceedings
38 herein be postponed until to-morrow morning at nine o'clock.

And afterwards, at said last-mentioned term of said circuit court, begun and held as aforesaid, the following further proceedings were had in said cause on the 27th day of April, A. D. 1888, to wit:

Hearing of Evidence.

WALLACE ESTILL *et al.*
vs.
NEW YORK, LAKE ERIE AND WESTERN RAILWAY CO.

This day come again the parties as on yesterday, and also come the jury; thereupon evidence was further heard and, not being concluded at the hour of adjournment, it is ordered that further proceedings herein be postponed until to-morrow morning at nine o'clock.

And afterwards, at said last-mentioned term of said circuit court, begun and held as aforesaid, the following further proceedings were had in said cause on the 28th day of April, A. D. 1888, to wit:

Hearing of Evidence.

WALLACE ESTILL *et al.*
vs.
NEW YORK, LAKE ERIE & WESTERN R'Y CO.

This day come again the parties, by their respective attorneys, as on yesterday, and also comes the jury duly sworn herein; thereupon evidence was further heard and, not being concluded at the hour of adjournment, it is ordered that further proceedings herein be postponed until Monday morning at ten o'clock.

And afterwards, at said last-mentioned term of said circuit
39 court, begun and held as aforesaid, the following further proceedings were had in said cause on the 30th day of April, A. D. 1888, to wit:

Argued by Counsel.

WALLACE ESTILL *et al.*
vs.
NEW YORK, LAKE ERIE & WESTERN R'Y CO.

This day come again the parties as on Saturday, and also come the jury duly sworn herein; thereupon evidence was further heard and the cause argued by counsel and, not being concluded at the hour of adjournment, it is ordered that further proceedings herein be postponed until to-morrow morning at nine o'clock.

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had on the 1st day of May, A. D. 1888, to wit:

Further Argument by Counsel; Jury Charged.

WALLACE ESTILL *et al.*
vs.
NEW YORK, LAKE ERIE & WESTERN RAILWAY CO. *et al.*

This day come again the parties, by their attorneys, as on yesterday, and also comes the jury, duly sworn herein; thereupon this cause was further argued by counsel and at the conclusion thereof the court charged the jury as to the law of the case, and, it having been submitted to them, said jury retired to consider what verdict they shall render herein, and afterwards return into court the following verdict, to wit:

Verdict.

WALLACE ESTILL *et al.*
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

"We, the jury, find the issues for the plaintiffs and assess
40 the damages by them sustained at the sum of eight thousand seven hundred and fifty dollars, and we allow interest in the sum of two thousand three hundred and sixty-two & $\frac{50}{100}$ dollars, making the total damages assessed the sum of eleven thousand one hundred and twelve & $\frac{50}{100}$ dollars.

SAMUEL GRANT, *Foreman.*"

And afterwards, at said last-mentioned term of said circuit court, begun and held as aforesaid, the following further proceedings were had on the said 1st day of May, A. D. 1888, to wit:

This day the following stipulation was filed herein and ordered to be entered of record, viz:

Stipulation as to Time of Hearing Motions for New Trial, etc.

"In the Circuit Court of the United States for the Central Division of the Western District of Missouri, April Term, 1888.

LEVERETT LEONARD *et al.*
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD CO. } 2033

and &

W. R. ESTILL *et al.*
vs.
SAME DEFENDANT. } 2024.

In the above causes which were consolidated and tried together it is stipulated that motions for new trial may be made and heard before Judge Thayer, in vacation, at St. Louis, and that all necessary steps to remove said causes or either of them to the Supreme Court of the United States and make the writ or writs of error a supersedeas may also be taken in vacation, the same as in
41 term time, and all the necessary orders in that behalf may be made and the same entered of record as of the last day of the present term of this court.

(Signed) DRAFFEN & WILLIAMS,
COSGROVE & JOHNSTON,
Att'ys for Estill & Elliott.

(Signed) DRAFFEN & WILLIAMS,
COSGROVE & JOHNSTON,
O. GUITAR, S. BOYD,
Att'ys for Leonard Bros.

(Signed) POLLARD & WERNER,
Att'ys for Def'ts.",

And afterwards, at said last-mentioned term of said circuit court, begun and held as aforesaid, the following further proceedings were had on said 1st day of May, A. D. 1888, to wit:

Motion for New Trial Filed.

WALLACE ESTILL *et al.*
vs.
NEW YORK, LAKE ERIE & WESTERN RAILROAD CO. } 2023.

and

LEVERETT LEONARD *et al.*
vs.
NEW YORK, LAKE ERIE & WESTERN RAILROAD CO. } 2024.

This day there is filed herein defendant's motion for new trials in the above cases, and endorsed thereon is the following: "Mr. Geisberg will file this as a part of proceedings on May 1, '83, according to stipulation. May 3, '88. (Signed) A. M. Thayer, dist. judge."
(Motion for new trial copied on page 859.)

And afterwards, at a regular stated term of said circuit court, begun and held at the city of Jefferson, in said district, on the third Monday of November, 1888, there was present and presiding the Hon. John F. Philips, district judge for the western district
42 of Missouri, and during said term, to wit, on the 20th day of November, 1888, the following further proceedings were had in said cause, to wit:

Motion for New Trial Overruled; Judgment.

WALLACE ESTILL *et al.*
vs.
NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY. } 2023.

This day come the parties, by their respective attorneys—the plaintiffs by John Cosgrove & W. M. Williams, and the defendant by Garland Pollard, Esq.—and the court having fully considered the motion heretofore filed to set aside the verdict of the jury and grant a new trial and being duly advised of and concerning the same, it is ordered that said motion be overruled. It is therefore considered by the court that the plaintiffs, Wallace Estill, Hugh W. Elliott, and William R. Estill, have and recover of the defendant, The New York, Lake Erie and Western Railroad Company, the sum of ($11,112.50) eleven thousand one hundred and twelve dollars and fifty cents, being the damages by the jury assessed; and it is further ordered by the court that said plaintiffs have and recover of the defendant interest at the rate of six per cent. per annum from the date of the verdict, to wit, the first day of May, 1888, on the said sum of eleven thousand one hundred and twelve dollars and fifty cents ($11,112.50) until the same be paid, and also their costs and charges in this behalf laid out and expended, and that execution issue therefor.

43 The record in case Leverett Leonard *et al. vs.* The New York, Lake Erie and Western Railroad Company prior to and including the final judgment is in words and figures following, to wit:

Be it remembered that heretofore, to wit, on the 17th day of February, A. D. 1887, it being in vacation of the circuit court of the United States for the eastern division of the western district of Missouri, the following proceedings were had and appear of record, to wit:

Filing of Transcript & Other Papers from Western Division.

W. H. LEONARD *et al.*
vs.
N. Y., LAKE ERIE & W. R'Y Co. } 2024.

This day there is received and filed herein a transcript of the record entries as certified from the circuit court of the United States for the western division of the western district of Missouri; also transcript of the record and proceedings as certified from the circuit court of Saline county, Mo.—motion to quash writ, bill of exceptions to motion, answer, motion for new trial, and the motions filed in 2023 transferring case to the U. S. circuit court for the eastern division of the western district of Missouri.

The transcript of the record entries and proceedings had in this cause in the circuit court of the United States for the western division of the western district of Missouri, at Kansas City, filed as aforesaid, is in words and figures following, to wit:

UNITED STATES OF AMERICA, *sct:*

Transcript of Record Entries & Proceedings in Western Division; Transcript from State Court Filed.

44 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

THURSDAY, *May 15th*, 1884.—In vacation.

LEVERETT LEONARD *et al.*
against
N. Y., L. E. & W. R'Y Co. } 816.

This day there is received and filed herein a transcript of record from the circuit court of — county on change of forum.

Motion to Quash Writ Submitted.

May Term, 1884.

WEDNESDAY, *May 28th*, 1884.

LEVERETT LEONARD *et al.*
against
NEW YORK, LAKE ERIE AND WESTERN R'Y CO.

This day come the parties, by their attorneys, and the motion to quash the writ herein, being called for hearing, is argued by counsel and submitted to the court and taken under advisement.

Motion to Quash Overruled.

THURSDAY, *May 29th*, 1884.

LEVERETT LEONARD *et al.*
against
NEW YORK, LAKE ERIE & WESTERN R'Y CO. } 816.

The motion to quash herein having been submitted, it is now ordered that the same be denied.

45 *Answer Filed.*

THURSDAY, *July 17th*, 1884.—In vacation.

LEVERETT LEONARD *et al.*
against
NEW YORK, LAKE ERIE & WESTERN RAILWAY CO. } 816.

This day comes the defendant, by Garland Pollard, Esq., its solicitor, and files answer herein.

Continuance.

October Term, 1884.

WEDNESDAY, *November 12th*, 1884.

LEVERETT LEONARD *et al.*
against
N. Y., L. E. & W. R'Y CO. } 816.

Ordered that this cause be continued.

Continuance.

May Term, 1885.

FRIDAY, *May 22nd*, 1885.

LEVERETT LEONARD *et al.*
against
N. Y., L. E. & W. R'Y Co. } 816.

Ordered that this cause be continued.

Case Called; Jury Sworn; Evidence Heard.

October Term, 1885.

WEDNESDAY, *November 4th*, 1885.

WALLACE ESTILL *et al.*
against
N. Y., L. E. & W. R'Y Co. } 815.

and

LEVERETT LEONARD *et al.*
against
N. Y., L. E. & W. R'Y Co. } 816.

This day come the parties, by their attorneys—the plaintiffs by Wm. N. Williams and John Cosgrove, and the defendant by
46 Garland Pollard—and, these cases being called for trial, it is ordered that a jury come, to wit, D. M. Jarboe, John N. North, J. L. Petty, Joseph Hoblitzell, John L. Cole, Isaac T. Hosea, Herschel Bartlett, Addison Payne, George G. Stevenson, Enoch Dean, W. H. Bean, and D. F. Torbitt, twelve good and lawful men, who are duly sworn to try the issues joined, and, the hour of adjournment having now arrived, it is ordered that further proceedings be postponed until to-morrow morning.

Juror Discharged and Another Juror Sworn in Substitution; Evidence Further Heard.

THURSDAY, *November 5th*, 1885.

WALLACE ESTILL *et al.*
against
N. Y., L. E. & W. R'Y Co. } 815.

and

LEVERETT LEONARD *et al.*
against
N. Y., L. E. & W. R'Y Co. } 816.

This day again come the parties, by their attorneys, and the jury sworn to try this cause, as on yesterday; and thereupon, for good

cause shown to the court, it is ordered that Enoch Dean, one of the jurors empanelled and sworn to try this cause on yesterday, be excused from the further consideration of the same; and by consent of counsel for both plaintiffs and defendant, it is ordered that the panel be completed from the general panel; thereupon Webster Withers is called, chosen, and sworn to try the issues in substitution for the said Enoch Dean; thereupon the hearing of evi-
47 dence is proceeded with and, not being completed at the hour of adjournment, it is ordered that further proceedings be postponed until to-morrow morning.

Further Hearing of Evidence.

FRIDAY, *November 6th*, 1885.

WALLACE ESTILL *et al.*, LEVERETT LEONARD *et al.*
against
N. Y., L. E. & W. R'Y Co. } 815, 816.

This day again come the parties, by their attorneys, and the jury sworn to try this cause, as on yesterday; thereupon the hearing of evidence is proceeded with and, not being concluded at the hour of adjournment, it is ordered that further proceedings be postponed until to-morrow morning.

Further Hearing of Evidence.

SATURDAY, *November 7th*, 1885.

WALLACE ESTILL *et al.*, LEVERETT LEONARD *et al.*
against
N. Y., L. E. & W. R'Y Co. } 815, 816.

This day again come the parties, by their attorneys, and the jury sworn to try this cause, as on yesterday; thereupon the hearing of evidence is proceeded with and, not being completed at the hour of adjournment, it is ordered that further proceedings be postponed until Monday morning.

48 *Further Hearing of Evidence.*

MONDAY, *November 9th*, 1885.

WALLACE ESTILL *et al.*
against
N. Y., L. E. & W. R'Y Co. } 815.

and

LEVERETT LEONARD *et al.*
against
N. Y., L. E. & W. R'Y Co. } 816.

This day again come the parties, by their attorneys, and the jury sworn to try this cause, as on Saturday last; thereupon the hearing

of evidence is continued and, not being completed at the hour of adjournment, further proceedings are postponed until to-morrow morning.

Argument of Counsel.

TUESDAY, *November* 10*th*, 1885.

WALLACE ESTILL *et al.*, LEVERETT LEONARD *et al.*
against
N. Y., L. E. & W. R'Y Co. } 815, 816.

This day come again the parties, by their attorneys, and the jury sworn to try this cause, as on yesterday; thereupon the hearing of evidence is concluded, arguments of counsel are had, and further proceedings are postponed until to-morrow morning.

Further Argument of Counsel, Jury Charged, and Case Submitted.

WEDNESDAY, *November* 11*th*, 1885.

LEVERETT LEONARD *et al.*
against
N. Y., L. E. & W. R'Y Co.

49 This day again come the parties, by their attorneys, and the jury sworn to try this cause, as on yesterday; thereupon, after hearing the charge of the court, the jury retire to consider what verdict they shall render in the premises, and, after due consideration, return into court the following verdict, to wit:

Verdict.

"We, the jury, find for the plaintiffs, Leonard Bros., and assess their damages at twenty-four thousand one hundred and fifty dollars and six per cent. interest from November 27th, 1883; interest, 2,833.60.

D. M. JARBOE, *Foreman.*"

It is therefore considered by the court that the plaintiffs, Leverett Leonard, Charles E. Leonard, William H. Leonard, and Abiel Leonard, recover against the defendant, The New York, Lake Erie and Western Railroad Company, the said sum of twenty-six thousand nine hundred eighty-three dollars and sixty cents ($26,983.60), so found to be due, with their costs, and have thereof execution.

Motion for New Trial Filed.

And now again comes defendant, by attorney, and files motion for a new trial in this cause.

Motion for New Trial Submitted.

MONDAY, *January 4th*, 1886.

LEVERETT LEONARD *et al.*
against
N. Y., L. E. & W. R'Y Co. } 816.

This day come the parties, by their attorneys—the plaintiffs by Messrs. John Cosgrove and Wm. N. Williams, and the defendant by Garland Pollard—and the motion for a new trial in the above-entitled cause coming on for hearing, the same is argued by counsel and submitted to the court on briefs and abstracts to be filed.

50 *Motion for New Trial Sustained.*

MONDAY, *February 1st*, 1886.

LEVERETT LEONARD *et al.*
against
NEW YORK, L. E. & W. R'Y Co. } 816.

The motion of defendant for a new trial of this case having been heretofore submitted to the court and taken under advisement, *not* the premises having been duly considered and the court being fully advised concerning the same, it is by the court ordered that said motion be granted, and that the verdict and judgment heretofore rendered in this case be set aside and for nought held, and that a new trial of this case be had.

October Term, 1886.

MONDAY, *December 13th, A. D.* 1886.

WALLACE ESTILL *et al.*, LEVERETT LEONARD *et al.*
against
NEW YORK, LAKE ERIE & WESTERN RAILWAY Co. } 815, 816.

In pursuance of a stipulation of parties this day filed, which stipulation is in words and figures following, to wit:

Stipulation to Transfer Case to Eastern Division.

"In the Circuit Court of the United States, Western Division of the Western District of Mo., October Term, 1886.

WALLACE ESTILL *et al.* and LEVERETT LEONARD *et al.*, Plaintiffs,
vs.
51 THE NEW YORK, LAKE ERIE AND WESTERN R'Y Co., Defendants. } Nos. 815 & 816.

It is hereby stipulated and agreed by the parties to the above-entitled suits that the same may be transferred to the eastern divis-

ion of the western district of Missouri for trial, and that the clerk of this court shall transfer the depositions and all of the original papers in said causes to said eastern division of the western district, and that the same shall be placed on the docket for trial at the next term of this court for the eastern division of the western district of Mo., at Jefferson City, and no question shall be raised as to the jurisdiction of the court to which these cases are to be transferred at Jefferson City which could not be raised to the jurisdiction of this court, and no question as to the jurisdiction of this court shall be waived.

DRAFFEN & WILLIAMS,
COSGROVE & JOHNSTON,
O. GUITAR, BOYD & SEBREE,
Att'ys for Pl'ffs.
POLLARD & WERNER,
Att'ys for Def't."

Order of Transfer.

It is ordered by the court that these cases be transferred to Jefferson City for trial, and that the clerk of this court transfer the papers in these cases, together with a certified transcript of all the record entries in said cases, to the clerk of the United States circuit
52 court for the eastern division of the western district of Missouri, at Jefferson City, Mo.

Clerk's Certificate.

UNITED STATES OF AMERICA, *sct:*

I, H. C. Geisburg, clerk of the circuit court of the United States for the western division of the western district of Missouri, do hereby certify that the foregoing is a true and complete transcript of the record entries in the cause therein named as fully as the same appear of record in my office at Kansas City, Mo.

Witness my hand as clerk and the seal of said court.
[SEAL.] Done at office, in Kansas City, Mo., this 8th day of January, A. D. 1887.

H. C. GEISBERG, *Clerk,*
By WARREN WATSON,
Deputy Clerk.

The transcript of the record proceedings in this cause in the circuit court of Saline Co., Mo., filed as aforesaid, is in words and figures following, to wit:

Transcript from Saline County Circuit Court.

STATE OF MISSOURI, } ss:
County of Saline, }

Pleas before the circuit court of Saline county, at the city of Marshall, State and county aforesaid, before the Hon. John P. Strother, judge of the sixth judicial circuit of the State of Missouri, in the cause wherein Leverett Leonard, Charles E.
53 Leonard, William H. Leonard, and Abiel Leonard are plaintiffs against The New York, Lake Erie and Western Railroad Company, defendants.

Be it remembered that on the 27th day of November, A. D. 1883, a petition and bond was filed in the above-entitled cause in the office of the clerk of the circuit court in and for the county of Saline; which said petition is in words and figures following, to wit:

Petition.

In the Circuit Court of Saline County, Missouri, Febr'y Term, 1884.

LEVERETT LEONARD, CHARLES E. LEONARD, WILLIAM H. LEONARD, and ABIEL LEONARD, Plaintiffs,
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant.

Plaintiffs state that on the 12th day of September, 1883, they were the owners of three hundred and six head of imported polled Angus or Aberdeen and Galloway cattle, which they had imported at great costs and expense from Scotland and which were of the value of two hundred thousand dollars; that said cattle were intended for the Missouri market; that defendant had full knowledge of the value of said cattle and the purposes for which they were intended; that defendant is now and was on said 12th day of September, 1883, a railroad corporation duly organized and existing according
54 to law, and as such was engaged in running and operating a railroad through the State- of New York and Ohio and was, as such corporation, a common carrier of live stock and other freight over the line of its said railroad in said States.

That on or about the said 12th of September, 1883, plaintiffs delivered to defendant as such common carrier, to be transported over its line of railway, the said three hundred and six head of imported cattle, and that defendant received them as such common carrier, well knowing the value of said cattle and the importance of transporting them with care and reasonable dispatch.

That thereupon defendant as such common carrier undertook and became bound to transport said cattle over its said railway safely and to deliver them at the terminus thereof within a reasonable time after they were delivered to and received by it.

That plaintiffs paid the usual and customary freight and charges for the transportation of said cattle over defendant's said road.

That defendant wholly, in disregard of its duty as such common carrier and in violation of its said undertaking, failed and neglected to transport said cattle in safety and with reasonable dispatch; but, on the contrary, on or about the 16th day of September, in the year aforesaid, at Mankin, in the State of Ohio, negligently and carelessly run the two trains or sections of a train upon which said cattle were being carried over defendant's railway into and against each
55 other with such force and violence that a large number of the cars, to wit, about sixteen, in which said cattle were at the time were broken into pieces and wholly demolished, and plaintiffs' said cattle greatly jarred, bruised, maimed, wounded, crippled, and injured, and a number of said cattle, to wit, seven head, killed or so badly crippled and injured that they were rendered wholly worthless and a total loss to plaintiffs.

That about two hundred and fifty of said cattle were cows in calf, and that about sixty of them since said injury and accident and in consequence thereof have prematurely lost their calves.

That said cattle were detained at the place of said accident for about thirty-six hours after the same occurred without suitable feed, water, or attention, and in consequence of which they were greatly damaged and depreciated in value.

That plaintiffs, in consequence of the injuries received by said cattle as aforesaid, have been put to great trouble and expense in caring for and attending to them, and by reason of the accident the value of said cattle was greatly reduced.

That by reason of the premises plaintiffs have sustained damages in the sum of fifty thousand dollars, and for which sum and for costs of suit they pray judgment against the defendant.

DRAFFEN & WILLIAMS,
COSGROVE & JOHNSTON,
Plaintiffs' Attorneys.

56 STATE OF MISSOURI, } ss:
County of Jackson, }

Leverett Leonard, one of the above-named plaintiffs, being duly sworn, upon his oath says that the plaintiffs have a just demand against the defendant, and that the amount which the affiant believes the plaintiff ought to recover after allowing all just credits and set-offs is fifty thousand dollars, and that the defendant is a corporation whose chief officer or place of business is out of this State, and that the defendant is a corporation incorporated by a State other than the State of Missouri.

LEVERETT LEONARD.

Sworn and subscribed to before me this 17th day of Nov., 1883. My commission as a notary public expires Dec. 7, 1884.

WILLIAM K. HAWKINS,
[L. S.] *Notary Public, Jackson County, Mo.*

And said bond is in words and figures following, to wit:

Attachment Bond.

LEVERETT LEONARD *et al.*, Pl'ffs,
vs.
THE NEW YORK, LAKE ERIE & WESTERN RAILWAY CO., Def't.

Bond.

57 We, L. Leonard and W. H. Leonard, as principals, and J. H. Cordell, A. Leonard, Charles E. Leonard, and Jas. A. Gordon, as securities, acknowledge ourselves to be indebted to the State of Missouri in the sum of one hundred thousand dollars; for the payment whereof we bind ourselves, our heirs, executors, and administrators.

The condition of the above obligation is such that whereas L. Leonard and others as plaintiffs are about to commence a suit by attachment in the circuit court of Saline county, Missouri, against The New York, Lake Erie and Western Railway Company, defendant, returnable to the next February term thereof, wherein the sum sworn to is fifty thousand dollars and — cents:

Now, therefore, if the said plaintiffs shall prosecute their action without delay and with effect, refund all sums of money that may be adjudged to be refunded to the defendant or found to have been received by the plaintiffs and not justly due to them, and pay all damages and costs that may accrue to any defendant or garnishee by reason of the attachment or any process or proceeding in the suit or by reason of any judgment or process thereon, then this obligation is to be void; otherwise to remain in full force.

Witness our hands and seals this 21st day of November, A. D. 1883.

(Signed)
L. LEONARD. [SEAL.]
W. H. LEONARD. [SEAL.]
J. H. CORDELL. [SEAL.]
58 A. LEONARD. [SEAL.]
CHAS. E. LEONARD. [SEAL.]
JAS. A. GORDON. [SEAL.]

Approved by the court this 27th day of November, 1883.
G. W. LANKFORD, *Clerk*,
P'r E. T. OREAR, *D. C.*

And afterwards, to wit, on the 28th day of November, A. D. 1883, writ of attachment was issued by the clerk and delivered into the hands of the sheriff of Saline county; which said writ is in words and figures following, to wit:

Attachment to Sheriff of Saline County.

STATE OF MISSOURI, }
County of Saline. }

OFFICE OF CIRCUIT CLERK.

The State of Missouri to the sheriff of Saline county, Greeting:

We command you to attach "The New York, Lake Erie and Western Railway Company" by all and singular their lands & tenements, goods, chattels, moneys, credits, evidences of debt, and effects, or so much thereof as shall be sufficient to secure the sum of fifty thousand dollars and costs, with interest and costs of suit, in whose hands or possession soever the same may be found, and that you summon the said New York, Lake Erie & Western Railway Company that they be and appear at the next term of the circuit court, before the judge thereof, on the first day of said term,
59 to be holden at the city of Marshall and State of Missouri, within and for the county of Saline, on the 2nd Monday of February next, then and there to answer the complaint of Leverett Leonard, Charles E. Leonard, William H. Leonard, and Abiel Leonard as set forth in the annexed petition.

And also that you summon all and every person in whose hand or possession soever any personal property, rights, goods, chattels, moneys, credits, evidences of debt, or effects may be found, or who may be named by the plaintiffs or their attorneys as garnishee, and particularly that they be and appear before the judge of our said court on the first day of the term aforesaid, then and there to answer unto what may be objected against them; and have you then and there this writ.

Witness G. W. Lankford, clerk of our said circuit court, and the seal thereof hereunto affixed, at office, in Marshall, this 28th day of November, in the year of our Lord one thousand eight hundred and eighty-three.

G. W. LANKFORD,
Circuit Clerk,
[L. S.] By E. T. OREAR, *Deputy.*

And there is endorsed on the back of said writ the following return by the sheriff, to wit:

"*Sheriff's Return.*"

Served the within writ by making diligent search for property belonging to the within-named railroad company, and, fail-
60 ing to find anything on which to levy, return the same not satisfied.

Done in Saline county, Missouri, this Feb'y 11th, 1884.

R. W. HICKMAN,
Sheriff, Saline County,
By JOHN R. CASON, *D. S.*

And afterwards, to wit, on the 30th day of November, A. D. 1883, there was issued from said office a writ of attachment in this said cause, directed to the sheriff of the city of St. Louis; which said writ is in words and figures following, to wit:

Attachment to the Sheriff of the City of St. Louis.

STATE OF MISSOURI, } ss:
County of Saline, }

OFFICE OF CIRCUIT CLERK.

The State of Missouri to the sheriff of the city of St. Louis, Greeting:

We command you to attach "The New York, Lake Erie and Western Railway Company by all and singular their lands and tenements, goods, chattels, moneys, credits, evidences of debt, and effects, or so much thereof as shall be sufficient to secure the sum of fifty thousand dollars and — cents. with interest and costs of suit, in whose hand or possession soever the same may be found, and that you summon the said New York, Lake Erie & Western Railway Company that it be and appear at the next term of the circuit court, before the judge thereof, on the first day of said
61 term, to be holden at the city of Marshall and State of Missouri, within and for the county of Saline, on the 2d Monday of February next, and then and there to answer the complaint of Leverett Leonard, Charles E. Leonard, William H. Leonard, and Abiel Leonard, as set forth in the annexed petition.

And also that you summon all and every person in whose hand or possession soever any personal property, rights, goods, chattels, moneys, credits, evidences of debt, or effects may be found, or who may be named by the plaintiffs or their attorney as garnishee, and particularly that it be and appear before the judge of our said court on the first day of the term aforesaid, then and there to answer unto what may be objected against them, and have you then and there this writ.

Witness G. W. Lankford, clerk of our said circuit court,
[L. S.] and the seal thereof hereunto affixed, at office, in Marshall, this 30th day of November, in the year of our Lord one thousand eight hundred and eighty-three.

G. W. LANKFORD,
Circuit Clerk,
By E. T. OREAR, *Deputy.*

And upon the back of said writ is endorsed the following sheriff's return, to wit:

Sheriff's Return.

62 Executed this writ in the city of St. Louis on the 7th day of January, 1884, by delivering a copy of the writ and petition as furnished by the clerk of the circuit court of Saline Co. to W. E.

Conner, city passenger agent of The New York, Lake Erie & Western R. R. Co., the within-named defendant, who was in its business office and had charge thereof at the time of said service. The president or any other chief officer of said defendant could not be found in the city of St. Louis at the time of said service.

ISAAC M. MASON,
Sheriff of the City of St. Louis,
By WM. KOTOVSCKY, *D'p'y.*

Fee, 1.00, p'd by pl'ff.

And afterwards, to wit, on the 11th day of February, it being the first day of the regular February term of said circuit court of Saline county, Missouri, there was filed in this cause a petition and bond by defendant; which said petition is in words and figures following, to wit:

Petition for Removal.

In the Circuit Court of Saline County, State of Missouri.

LEVERETT LEONARD, CHARLES E. LEONARD, WILLIAM H. LEONARD, and ABIEL LEONARD, Plaintiffs,
vs.
63 THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant.

Petition for removal to the circuit court of the United States for the western division of the western district of Missouri.

Suit in attachment.

To the honorable the circuit court of Saline county, State of Missouri:

Your petitioner, "The New York, Lake Erie and Western Railroad Company," appearing only for the purpose of making this application, respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars; that the controversy in this suit is between citizens of different States; that the petitioner was at the time of the commencement of this suit and still is a corporation organized under the laws of the State of New York and a citizen of that State, and that the plaintiffs, Leverett Leonard, Charles E. Leonard, and William H. Leonard and Abiel Leonard, were then and still are citizens of the State of Missouri.

And your petitioner offers herewith a good and sufficient surety for its entering in the said circuit court of the United States in and for the western division of the western district of Missouri, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by the said circuit court if said court shall hold this suit was wrongfully or improperly
64 removed thereto.

And it prays this honorable court to proceed no further

herein except to make the order of removal required by law and to accept the said surety and bond, & to cause the record herein to be removed into the said circuit court of the United States for the western division of the western district of Missouri; and it will ever pray.

NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, *Petitioner*,
By H. J. JEWETT, *Its President*.

STATE OF MISSOURI, }
County of Saline, } ss:

I, Garland Pollard, being first duly sworn, on oath do say that I am the attorney for the petitioner in the above cause; that I have read the foregoing petition and know the contents thereof, and that the statements therein contained are true, as I verily believe.

(Signed) GARLAND POLLARD.

Subscribed and sworn to by the said Garland Pollard, before me, this 11th day of February, A. D. 1884.

G. W. LANKFORD, *Cir. Cl'k*,
[L. S.] By E. T. OREAR, *D. C.*

And said bond is in words and figures following, to wit:

65 *Bond of Removal.*

Know all men by these presents that the New York, Lake Erie and Western Railroad Company, as principal, and P. H. Rea, of Marshall, in the county of Saline and State of Missouri, as surety, are held and firmly bound unto Leverett Leonard, Charles E. Leonard, William H. Leonard, and Abiel Leonard in the penal sum of one thousand dollars, lawful money of the United States; for the payment of which, well and truly to be made, we oind ourselves and our heirs, executors, or administrators, jointly and severally and firmly, by these presents.

Witness our hands and seals this 11th day of February, A. D. 1884.

The condition of this obligation is such that if the above-bounden New York, Lake Erie & Western Railroad Company shall enter and file or cause to be entered and filed in the next circuit court of the United States in and for the western division of the western district of Missouri on the first day of its next session copies of all process, pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the circuit court of Saline county, State of Missouri, in which Leverett Leonard, Charles E. Leonard, William H. Leonard, and Abiel Leonard are plaintiffs and said New York, Lake Erie & Western Railroad Company is defendant and shall pay all costs that may be awarded by said United States court if said court shall hold that such suit was wrongfully or improperly
66 removed thereto and do such other appropriate acts as by the acts of Congress in that behalf are required to be done upon

the removal of such suit from said State court into the United States court, then this obligation to be void; otherwise of force.

NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, [SEAL.]
[L. S.] By H. J. JEWETT, *Pres't.* [SEAL.]
P. H. REA. [SEAL.]

Attest: A. P. MULDONOUGH, *Secretary.*

And on said 11th day of February, A. D. 1884, at said first day of said February term of said circuit court, the following entry was made of record—that is to say:

Order of Removal.

LEVERETT LEONARD *et al.*, Plaintiffs,
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD CO., Def't.

And now, at this day, comes the defendant, by attorney, and files herein petition, application, and bond for a removal of this cause to the circuit court of the United States. Said bond is examined and approved, application heard and granted, and it is ordered that this cause be removed to the United States circuit court of the western division of the western district of Missouri, and the clerk of this court is ordered to proceed without delay to make out a full and complete transcript of the record and proceedings in this
67 cause and transmit the same, together with all of the original papers not forming a part of the record herein, to the clerk of said court, at Kansas City.

Clerk's Certificate.

STATE OF MISSOURI, } *ss:*
County of Saline, }

I, George W. Lankford, clerk of the circuit court within and for the county and State aforesaid, hereby certify that the above and foregoing is a full, true, and complete transcript of the proceedings and record in the case wherein Leverett Leonard *et al.* are plaintiffs and The New York, Lake Erie and Western Railroad Company is defendant, as the same is of record and on file in my office.

Witness my hand as clerk of said court, with the seal of my said office, at the city of Marshall, Mo., this 15th day of February, A. D. 1884.

G. W. LANKFORD, *Clerk,*
By E. T. OREAR, *Deputy.*

Bill of Costs.

G. W. Lankford, clerk c't Saline Co., Mo., filing, 10; 2 writs attach., 2.00; 2 copies writ, 20	2 30	
4 copies pet., 6.00; 8 c't's, 4.00	10 00	
Dock., 10; 1 order, 30; app., 20	60	
Approving bond, 50	50	
		13 40
R. W. Hickman, sh'ff Saline Co., "*nulla bona*" return		50
		13 90

I. N. Mason, sh'ff St. Louis, serving 1 writ, 1.00; p'd by pl'ffs, 1.00.

I certify the above costs to be correctly taxed, and, further, that none of the same has been paid except as stated.

Attest: G. W. LANKFORD,
By E. T. OREAR, *D. C.*

68 The bill of exceptions filed as aforesaid is in words and figures following, to wit:

Bill of Exceptions.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, May Term, 1884.

LEVERETT LEONARD, CHARLES E. LEONARD, William H. Leonard, & Abiel Leonard, Plaintiffs,
vs.
NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant.

Removal from Saline Circuit Court. Attachment.

Be it remembered that at the May term of said court the defendant entered a special appearance in the above cause and filed its motion to quash the writ of summons issued to the sheriff of the city of St. Louis in said cause and the return of the said sheriff thereon; which said motion is in the words and figures following—that is to say:

Motion to Quash Writ.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, May Term, 1884.

LEVERETT LEONARD, CHARLES E. LEONARD, William H. Leonard, & Abiel Leonard, Plaintiffs,
vs.
NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant.

Attachment Removed from Circuit Court of Saline County.

69 And now comes the said defendant and, appearing specially and only for the purpose of making this motion, moves the

court to quash the writ of summons issued in this case to the sheriff of the city of St. Louis and the return of the said sheriff of service thereon on the ground that the said writ of summons and the return thereon are void and confer no jurisdiction upon the court over defendant for the following reasons appearing upon the face of the record:

1. Defendant, being a foreign railroad corporation operating a railroad in the State of New York and Ohio which does not terminate opposite any point in the State of Missouri, cannot be brought into the courts of Missouri by writ of summons.

2. The cause of action sued on did not accrue in Saline county, where this suit was brought, and the business office of the defendant at the time of the alleged service was not in that county but in the city of St. Louis.

3. The record fails to show that at the time of said service or at any time the defendant was engaged in business in the State of Missouri.

NEW YORK, LAKE ERIE AND WESTERN RAILROAD CO.,
By GARLAND POLLARD,
Its Attorney Specially for the Purpose of Making this Motion.

But the court overruled the said motion; to which order and decision of the court overruling said motion the defendant then and there excepted, and, inasmuch as the matters aforesaid do
70 not appear of record, the counsel for the defendant presents this bill of exceptions and prays that the same may be signed and sealed by the court and made a part of the record in said cause, and it is done accordingly.

DAVID J. BREWER, *Judge.* [SEAL.]

The answer filed as aforesaid is in the words and figures following, to wit:

Answer.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, May Term, 1884.

LEVERETT LEONARD *et al.*, Plaintiff-,
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant.
} Attachment Removed from the Saline Circuit Court.

And now comes the said defendant and denies all the allegations of the plaintiffs' petition; and now, having fully answered, defendant asks to be discharged with its reasonable costs.

By GARLAND POLLARD, *Its Att'y.*

Motion for new trial filed as aforesaid is in words and figures following, to wit:

Motion for New Trial.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, *ss.*, October Term, 1885.

LEVERETT LEONARD *et al.* *vs.* THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.	Removal from State Court.

Motion for new trial.

And now comes the said defendant and moves the court to set aside the verdict of the jury and to grant a new trial in the above cause on the grounds and for the reasons following:

1. The court gave improper instructions to the jury.
2. The court refused proper and legal instructions asked by defendant.

71 3. The court admitted improper and incompetent evidence offered by plaintiffs against the objection of defendant.

4. The court rejected proper and competent evidence offered by defendant.

(5.) The verdict is against the law.

6. The verdict is contrary to the evidence and against the weight of evidence.

7. The damages are excessive.

(8.) The court erred in overruling the defendant's motion to quash the return of service on the summons by the sheriff in this case.

G. POLLARD,
Att'y for Def't.

The stipulation to transfer is in words and figures following, to wit:

Stipulation to Transfer to Eastern Division.

In the Circuit Court of the U. S., Western Division of the Western District of Mo., October Term, 1886.

WALLACE ESTILL *et al.* and LEVERETT LEONARD *et al.*, Plaintiff-, *vs.* THE NEW YORK, LAKE ERIE AND WESTERN R'Y Co., Defendants.	No. 815 & 816.

It is hereby stipulated and agreed by the parties to the above-entitled suits that the same may be transferred to the eastern division of the western district of Missouri for trial, and that the clerk of this court shall transfer the depositions and all of the original papers in said causes to said eastern division of the western district,

and that the same shall be placed on the docket for trial at the next term of this court for the eastern division of the western district of Mo., at Jefferson City, and no question shall be raised as to the jurisdiction of the court to which these cases are to be transferred at Jefferson City which could not be raised to the jurisdiction of this court, and no question as to the jurisdiction of this court shall be waived.

DRAFFEN & WILLIAMS,
COSGROVE & JOHNSTON,
O. GUITAR, BOYD & SEBREE,
Att'ys for Pl'ff.
POLLARD & WERNER,
Att'ys for Def't.

72 And afterwards, at the April term, A. D. 1887, of said circuit court, the following further proceedings were had in this cause on the 19th day of April, A. D. 1887, to wit:

Continuance.

LEVERETT LEONARD *et al.* } 2024.
vs.
N. Y., L. E. & W. R'Y Co. }

On motion of plaintiffs, it is ordered that this case be continued until the next term of this court.

And afterwards, at the November term, A. D. 1887, of said circuit court, the following further proceedings were had in this cause on the 29th day of November, A. D. 1887, to wit:

Continuance.

LEVERETT LEONARD *et al.* } 2024.
vs.
N. Y., L. E. & W. R'Y Co. }

By consent of parties it is ordered that this case be now continued until the next term of this court.

And afterwards, at a regular stated term of the United States circuit court, begun and held at the city of Jefferson, in said district, on the third Monday of April, 1888, there was present and presiding the Honorable Amos M. Thayer, district judge for the eastern district of Missouri, under and in pursuance of the order of appointment made by the circuit judge of this circuit (see order copied on page 36 of this transcript), and on the 26th day of April, 1888, the following proceedings were had, to wit:

Case Called; Jury Sworn; Hearing of Evidence.

LEVERETT LEONARD *et al.*
vs.
N. Y., L. E. & W. R'Y Co. } 2024.

This day come the parties, by their respective attorneys—the plaintiffs by Mess. Wm. M. Williams, John Cosgrove, Samuel
73 Boyd, and Odon Guitar, and the defendant by Mess. Garland Pollard and Percy Werner—and this case being regularly called and both parties being ready, it is ordered that a jury come, to wit, W. W. Hockman, I. M. Greer, Samuel Grant, Benjamin Jones, Peter Willis, S. M. Meng, Henry Burger, Louis Wolferman, W. H. Davis, L. C. Isom, Joseph Talbott, and John Knight, twelve good and lawful men, who were duly sworn well and truly to try the issues herein joined; thereupon evidence is heard and, not being concluded at the hour of adjournment, it is ordered that further proceedings herein be postponed until to-morrow morning at nine o'clock.

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had in said cause on the 27th day of April, A. D. 1888:

Further Hearing of Evidence.

LEVERETT LEONARD *et al.*
vs.
NEW YORK, LAKE ERIE AND WESTERN RAILWAY CO. } 2024.

This day come again the parties as on yesterday, and also come the jury duly sworn herein; thereupon evidence was further heard and, not being concluded at the hour of adjournment, it is ordered that further proceedings herein be postponed until to-morrow morning at nine o'clock.

And afterwards, at said April term, A. D. 1888, of said circuit court, the following further proceedings were had on the 28th day of April, A. D. 1888, to wit:

74 *Further Hearing of Evidence.*

LEVERETT LEONARD *et al.*
vs.
NEW YORK, LAKE ERIE & WESTERN R'Y CO. } 2024.

This day come again the parties, by their respective attorneys, as on yesterday, and also comes the jury duly sworn herein; thereupon evidence was further heard and, not being concluded at the hour of adjournment, it is ordered that further proceedings herein be postponed until Monday morning at ten o'clock.

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had on the 30th day of April, A. D. 1888, to wit:

Argument by Counsel.

LEVERETT LEONARD *et al.*
vs.
NEW YORK, LAKE ERIE & WESTERN R'Y CO. } 2024.

This day come again the parties as on Saturday last, and also come the jury duly sworn herein; thereupon evidence was further heard and the cause argued by counsel and, not being concluded at the hour of adjournment, it is ordered that further proceedings herein be postponed until to-morrow morning at nine o'clock.

And afterwards, at said April term, A. D. 1888, of said circuit court, the following further proceedings were had on the 1st day of May, A. D. 1888, to wit:

75 *Further Argument by Counsel, Jury Charged, & Cause Submitted.*

LEVERETT LEONARD *et al.*
vs.
NEW YORK, LAKE ERIE & WESTERN RAILROAD CO. } 2024.

This day come again the parties, by their respective attorneys, as on yesterday, and also come the jury duly sworn herein; thereupon this cause was further argued by counsel and at the conclusion thereof the court charged the jury as to the law of the case, and, — having been submitted to them, said jury retired to consider of what verdict they shall render herein, and afterwards return into court the following verdict, to wit:

Verdict.

LEVERETT LEONARD *et al.*
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY. } No. 2024.

We, the jury, find the issues for the plaintiffs and assess the damages by them sustained at the sum of forty-four thousand dollars, and we allow interest in the sum of eleven thousand eight hundred and eighty dollars, making the total damages assessed the sum of fifty-five thousand eight hundred and eighty dollars.

SAM'L GRANT, *Foreman.*

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had on said 1st day of May, A. D. 1888:

This day the following stipulation was filed herein and ordered to be entered of record, viz:

Stipulation as to Time of Hearing Motion for New Trial, etc.

In the Circuit Court of the United States for the Central Division of the Western District of Missouri, April Term, 1888.

LEVERETT LEONARD *et al.*
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD CO.

and

W. R. ESTILL *et al.*
vs.
SAME, Defendant.

76 In the above causes, which were consolidated and tried together, it is stipulated that motions for new trial may be made and heard before Judge Thayer in vacation at St. Louis, and that all the necessary steps to remove said causes or either of them to the Supreme Court of the United States and make the writ or writs of error a supersedeas may also be taken in vacation, the same as in term time, and all the necessary orders in that behalf may be made and the same entered of record as of the last day of the present term of this court.

(Signed) DRAFFEN & WILLIAMS,
" COSGROVE & JOHNSTON,
Att'ys for Estill & Elliott.
" DRAFFEN & WILLIAMS,
" COSGROVE & JOHNSTON,
" O. GUITAR, S. BOYD,
Att'ys for Leonard Bros.
" POLLARD & WERNER,
Att'ys for Def'ts.

And afterwards, at the said April term, A. D. 1888, of said circuit court, the following further proceedings were had on the said 1st day of May, A. D. 1888:

Motion for New Trial Filed.

WALLACE ESTILL *et al.*
vs.
NEW YORK, LAKE ERIE & WESTERN RAILROAD CO. } 2023.

and

LEVERETT LEONARD *et al.*
vs.
NEW YORK, LAKE ERIE & WESTERN RAILROAD CO. } 2024.

This day there is filed herein defendant's motion for new trials in the above cases, and endorsed thereon is the following:

"Mr. Geisberg will file this as part of proceedings on May 1, '88, according to stipulation.

May 3, '88.

(Signed) A. M. THAYER,
Dist. Judge."

(Motion for new trial is copied on page 859 of this transcript.)

77 And afterwards, at a regular stated term of said circuit court begun and held at the city of Jefferson, in said district, on the 3d Monday of November, A. D. 1888, there was present Hon. John F. Philips, district judge for the western district of Missouri, who presided at said term; and on the 19th day of November, 1888, the following further proceedings were had in said cause, to wit:

Remittitur Entered.

LEVERETT LEONARD *et al.*
vs.
NEW YORK, LAKE ERIE & WESTERN R'Y CO. } 2024.

This day come the plaintiffs, by their attorneys, Messrs. John Cosgrove and W. M. Williams, and freely and voluntarily remit from the amount of the verdict rendered by the jury in this cause the sum of five thousand eight hundred and eighty dollars ($5,880), so as to reduce the verdict to the sum of fifty thousand dollars ($50,000).

The remittitur filed as aforesaid is in words and figures following, to wit:

Remittitur.

In the United States Circuit Court for the Central Division of the Western District of Missouri.

LEVERETT LEONARD, CHARLES E. LEONARD, WILLIAM H. LEONARD, and ABIEL LEONARD
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILWAY COMPANY.

Now come the plaintiffs in the above-entitled cause, by their attorneys, and freely and voluntarily remits from the amount of the verdict rendered by the jury in this cause the sum of five thousand eight hundred and eighty (5,880) dollars, so as to reduce the
78 verdict to the sum of fifty thousand (50,000) dollars.

LEVERETT LEONARD,
CHARLES E. LEONARD,
WILLIAM H. LEONARD,
ABIEL LEONARD,
By DRAFFEN & WILLIAMS AND
COSGROVE & JOHNSTON, *Their Att'ys.*

And afterwards, at said last-mentioned term of said circuit court begun and held as aforesaid, the following further proceedings were had in said cause on the 20th day of November, A. D. 1888, to wit:

Motion for New Trial Overruled; Judgment.

LEVERETT LEONARD *et al.*
vs.
NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY. } 2024.

This day come again the plaintiffs, by Messrs. John Cosgrove and W. M. Williams, their attorneys, as well as the defendant, by Garland Pollard, Esq., its attorney; and the plaintiffs having in open court freely and voluntarily remitted the sum of five thousand eight hundred and eighty dollars of the damages by the jury assessed, the motion for a new trial heretofore filed by the defendant is now by the court overruled. Wherefore it is considered by the court that the plaintiffs, Leverett Leonard, Charles E. Leonard, William H. Leonard, and Abiel Leonard, have and recover of the defendant, The New York, Lake Erie and Western Railroad Company, the sum of fifty thousand dollars, being the damages by the jury assessed as aforesaid, less the amount remitted by the plaintiffs, as above stated; and it is further considered by the court that the plaintiffs have and recover of defendant interest, at the rate of six per
79 cent. per annum, from the date of the verdict, to wit, the first day of May, 1888, on the said sum of fifty thousand dollars until the same be paid, and also their costs and charges in this behalf laid out and expended, and that execution issue therefor.

And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had on the said 20th day of November, A. D. 1888, to wit:

Bill of Exceptions Filed.

WALLACE ESTILL *et al.*
vs.
NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY. } 2023.

LEVERETT LEONARD *et al.*
vs.
NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY. } 2024.

This day comes the defendant, by Garland Pollard, its attorney, and presents to the court its bill of exceptions in the above-entitled causes, which, having been examined, is approved, signed, and sealed by the judge and ordered to be filed and made part of the record in said causes.

Writ of Error Allowed and Citation Signed.

There is also presented to the court a writ of error to reverse the judgments in said causes, and a citation directed to the plaintiffs citing and admonishing them to be and appear at and before the Supreme Court of the United States at the next term thereof, to be held at Washington, D. C., on the second Monday of October next; whereupon said writ of error is allowed and said citation signed by the judge.

Amount of Supersedeas Bond Fixed.

On motion of defendant's attorney and by consent, the super-
80 sedeas bond is fixed at the sum of $90,000 *dollars*, the same to be approved by the judge of this court and filed as of this date.

Certificate of Clerk as to Lodging Copy of Writ of Error.

This is to certify that the writ of error in said consolidated causes, which was allowed on the 20 day of November, 1888, as appears in the foregoing order, was served on the defendants in error by lodging a copy thereof, duly certified for the said defendants in error, in the clerk's office, where the record remains, on the said 20th day of November, A. D. 1888.

Attest: H. C. GEISBERG, *Clerk.*

The bill of exceptions so filed as aforesaid is in words and figures following, to wit:

81 *Bill of Exceptions.*

WALLACE ESTILL *et al.* and LEVERETT LEONARD *et al.*
vs.
NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.
} No. — and No. —. Consolidated.

Before Hon. Amos M. Thayer, judge.

In the Circuit Court of the United States, Central Division, Western District of Missouri.

JEFFERSON CITY, *April* 26, 1888.

Appearances: For plaintiffs, Messrs. John Cosgrove, W. M. Williams, Odon Guitar, and Samuel Boyd; for defendant, Messrs. Garland Pollard and Percy Werner.

A jury was empanelled and the pleadings were read. The two cases were consolidated for the purpose of trial.

Plaintiffs, to sustain the issues by them to be sustained, first offered and read in evidence the deposition of John Cunningham.

(During the reading of the deposition of John Cunningham by plaintiffs, after the reading of the question commencing, "Judging from your experience as a shipper of this class," etc.) Mr. Pollard said: We object. We claim that under the circumstances
82 we are not liable for abortions—nothing except injury to the animals; that damage from abortions is too remote; it is a peculiar condition of things; it is something we would not anticipate or know anything about. It is not alleged. So far there is no proof that we knew that these cattle were in calf.

The COURT: You can go on reading the deposition. Of course, that is a matter of law for the court to determine subsequently and to instruct the jury upon, whether it is an element of damage that can be recovered. I will not rule upon that proposition at this moment. I will not delay the reading of the deposition at this time.

(Counsel proceeded to read the deposition.)

After Recess.

The COURT: I don't care to hear any further argument on the subject discussed before recess. My opinion is that if a railroad company receives a cow or any other animal for transportation that is with calf, and such animal is of greater value at the point of destination by virtue of her being in such condition than she would otherwise be, and in the course of the journey through the fault of the carrier the animal receives an injury that is the direct and immediate cause of her losing her calf, that is an item of damage
83 that is recoverable from the carrier. It stands upon the same footing as an ordinary physical injury to the animal. Of course, there may be some difficulty on both sides in proving or disproving the fact alleged that a particular injury sustained led to the loss of calves, but the fact that there is difficulty in making the proof don't alter the rule of law. The difficulty is one of fact and not a difficulty in the law. I shall allow you to proceed on both sides and try that issue of fact.

Mr. POLLARD: Is that, your Honor, without regard to the knowledge of the carrier?

The COURT: I don't think that has anything to do with it. The carrier had a right to make any inquiry it saw fit before it received the property as to the condition the cows were in, and to make its arrangements accordingly. If no inquiries were made and the cattle were received, the rule stated applies.

To which ruling of the court the defendant at the time excepted.

Deposition of John Cunningham, on part of the plaintiffs, taken, pursuant to stipulation of counsel, before Louis L. Williams, a notary public, on May 21, 1885, at the law office of Draffen & Williams, in the city of Boonville, county of Cooper, State of Missouri, in the presence of Messrs. Cosgrove & Johnston and Draffen & Williams, on behalf of the plaintiffs, and Garland Pollard, Esq., on behalf of defendants.

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Deposition of John Cunningham.

JOHN CUNNINGHAM, of lawful age, being produced, sworn, and examined on the part of the plaintiffs, deposeth and saith:

Question by plaintiffs' attorney. State your name, age, and place of residence.

Answer. My name is John Cunningham; my age is 23 years; my residence is Tar Bruch Dalbattie, Scotland.

Question. What business are you engaged in, in Scotland, if any?

Answer. I been in the business of raising cattle all my life—thorough-bred cattle. My father and grandfather have been in the same business.

Question. When did you make your first visit to the United States?

Answer. It was in July, 1883.

Question. Are you acquainted with Leverett Leonard, Abiel Leonard, W. H. Leonard, Charles E. Leonard, H. W. Elliott, & Wm. R. Estill and Wallace Estill?

Answer. Yes; I am acquainted with them.

Question. When and where did you first become acquainted with them?

Answer. I met Leverett, Abiel, and Charles in Scotland. I met Leverett and Abiel Leonard in 1882. In 1883 I met Charles E. and Abiel Leonard, also H. W. Elliott and W. R. Estill, in Scotland.

85

Question. Do you know whether they purchased any cattle there in 1883?

Answer. Yes; they did purchase cattle there.

Question. State, if you know, what kind of cattle, breed, &c.

Answer. They purchased pure thoroughbred Galloways and pure thoroughbred Angus.

Question. State, if you know, how many were purchased by the Leonard Brothers and how many by Estill & Elliott.

Answer. Leonard Brothers purchased 315 and the remainder to Estill & Elliott. There was 382 in the shipment.

Question. When were these cattle shipped to the United States, if at all?

Answer. They were shipped on the steamer Virginia on July 1st from Liverpool to Boston, Mass.

Question. State whether you accompanied the cattle.

Answer. Yes; I did. I started with them from Scotland and accompanied them across the Atlantic to Boston, and then to Chicago, and with the Leonard cattle to Saline county.

Question. I understand you to say you came on the ship with the cattle. If so, what relation did you sustain towards the cattle, if any?

Answer. From the time they left Scotland until they left
86 quarantine at Concord, Mass., I had charge of all of them. Mr. Estill took charge of Estill & Elliott's portion of the cattle after they left Concord. I remained in charge of Leonard's cattle until they reached Mt. Leonard, in Saline county, Missouri.

Question. How many days were the cattle on the ocean, and what was the character of the voyage?

Answer. 12 days, and the voyage was the best I ever saw. The sea was so calm the port-holes behind the cattle were open all the way across. They were carried on the main deck. The hatchways were not closed during the trip.

Question. State, if you know, in what condition those cattle reached the port of Boston.

Answer. They reached the port in first-rate condition.

Question. Were they any lost on the trip? If so, state the number.

Answer. No; there was none lost.

Question. Who superintended the landing of the cattle from the ship, if anybody, at Boston?

Answer. I saw every one that came out of the ship. That was what I was attending to.

Question. State the manner of unloading the cattle from the ship.

Answer. They have a gangway from the ship onto the
87 wharf, and the cattle were untied and some of them were led out at first, and after that the others followed.

Question. You may state whether you inspected these cattle or examined them as they came off of the ship for the purpose of ascertaining their condition.

Answer. I saw them all as they came off, and did not examine them particularly, as there was a man there for that purpose, & I saw them all and they looked first rate and appeared to be in good health. There was a veterinary surgeon there to examine them—Dr. Thayer.

Question. Do you know whether they passed the examination or not?

Answer. Yes, I do; and they were permitted to land.

Question. Will you state if you know the manner in which the cattle were kept on the ship during the voyage?

Answer. There were stalls made to hold four cattle on the ship. In some instances, where the cattle were small, there were placed four in one stall, and in other instances two or three, according to size of the cattle. They were tied in the stalls, and there were troughs in front to feed them and water them.

Question. How long did they remain in Boston?

Answer. They were shipped out on cars from Boston to

88 Waltham on the day they landed. Waltham is about 8 or 9 miles from Boston. There they were put into quarantine.

Question. How long did they remain there?

Answer. About three weeks.

Question. Did you remain with them there?

Answer. Yes, sir.

Question. How often did you see them?

Answer. I saw them every day; the first thing in the morning and the last thing at night.

Question. State if the cattle were moved from Waltham; and, if so, to what place.

Answer. They were removed from Waltham to Concord, a distance of about ten miles. They were all driven across the country except one car-load—the heaviest bulls and one steer; I think 8 or 9 head.

Question. State whether you accompanied them or not.

Answer. I accompanied those that were driven on one day, and afterwards went on the train with the others, the next day or two.

Question. How long did the cattle remain at Concord?

Answer. They remained there over six weeks.

Question. State whether you remained with the cattle at Concord.

Answer. Yes; I stayed there all the time.

89 Question. State in what condition the cattle were when they reached Concord.

Answer. They were in very good condition. They were all well and hearty.

Question. State whether you were in charge of the cattle at Concord during the time they remained there. If so, how often did you see them, and what was their condition?

Answer. I was in charge of the cattle all the time they were there and saw them daily. They were all in first-rate condition, until a few got poisoned. There were five head that died. I don't know how many ate of the poison. I think that of those that died there were two calves and 3 heifers with calf. The two calves that died were from 6 to 8 months old.

Question. How many of the cattle showed sym-toms of having eaten of the poison?

Answer. I don't know how many, but I gave medicine to over thirty. I examined the cattle, and all those that seemed to be heavy and not as free as usual I gave medicine to. There was about 30. They were all heifers, except two or three cows.

Question. How long after the cattle reached Concord before you discovered the poisoning?

Answer. I am not positive, but something like two or three weeks.

Question. How did those that you gave medicine to seem to get along after that?

90 Answer. After we discovered the poison we put them into a yard about noon Sunday and kept them there until Tuesday morning, when they were all turned out but two. They appeared

to be in good health and showed no signs of fever. I mean those that were turned out on Tuesday morning.

Question. How long did you keep the other two in?

Answer. I kept them in the barn five or six days, and then turned them into the same lot that they came out of.

Question. When you took up the cattle and put them into the yard, did you take up all of them, or just those that showed symptoms of poisoning?

Answer. I just took up those that I thought showed symptoms.

Question. About how along did they remain at Concord after that?

Answer. They remained there about two or three weeks, I think.

Question. State whether you saw any evidence or signs of abortion among the cows up to time they were shipped from Concord.

Answer. No, I did not see any signs at all.

Question. Do you know whether any of them aborted or not?

Answer. I know that there was not a cow lost her calf dur-
91 ing the time I was with them, whilst they were in quarantine.

Question. State whether you were with them all the time whilst they were in quarantine.

Answer. Yes, I was.

Question. What was the condition of the cattle at the time they were shipped from Concord to Missouri?

Answer. It was good condition. They had improved greatly since they had left the ship. They looked better, gained flesh, &c., and their general appearance was much better

Question. Did you help load the cattle on the cars at Concord?

Answer. Yes, sir.

Question. State whether you came on the same train with the cattle from Concord to Missouri.

Answer. Yes, sir.

Question. How many car-loads of cattle in all were there of Leonard Bros.' and Estill & Elliott's?

Answer. They were 30 cattle cars, one box car, caboose, and engine. It was a special train.

Question. How far West did it run as one train?

Answer. It run as far as Kent, Ohio, I think. At that place I suppose the road was so bad they divided the train into two sections.

92 Question. State whether there was any accident occurred during the trip; and, if so, where and how many.

Answer. Yes; we had two accidents. The first one was at Meadville Junction, I think, or a junction near Meadville, Pa. That accident was caused by an engine striking our train in the rear. It smashed the caboose and the box car and slightly damaged the cattle cars—that is, two of them—but not so much as to prevent them going on. Did not see that it damaged any of the cattle.

(Defendant's counsel here objects to the last answer on the ground that it has no bearing on the accident car sued for and is immaterial.)

Question. When was the next accident, if any?

Answer. At Nankin, Ohio.

Question. How was the train running—was it in two sections or divisions, or one?

Answer. It was in two sections. I was on the first.

Question. How many car-loads of Leonard, Estills & Elliott's cattle were there on the section on which you were riding?

Answer. I don't remember. The train was divided in the night-time and I don't know how many cars were in each section.

93 Question. Please state when the accident occurred at Nankin, and the character and nature of it, and all you know about it.

Answer. The accident occurred on Sunday morning between 4 and 5 o'clock. The first section was standing on the switch at Nankin. A freight train was on the main line going East. The second section of our train run into the rear end of the first section. It was a very serious accident. The shock was of such a nature that all the cars were more or less damaged. There was a partition on the stock cars in which the feed and water was kept separate from the cattle, and this partition in the car next to the engine in the first section was broken. The caboose in the rear of the first section was smashed into atoms. There were two cattle cars between the caboose and a box car in which I was riding and sleeping. There were some of the most valuable bulls in the car next to the caboose. That car was knocked off of the track and thrown on its side; it was smashed up and was so badly wrecked that it was fit for nothing, and the company burnt it up. The next one was a complete wreck also, and was also burned by the company. There

94 were four cattle killed outright, and three of them so badly injured that they were left there. I believe that the animals that were killed were out of the three cars—two next to the caboose and the first car behind the engine on the second section. There were 9 or 10 cars thrown from the track and so badly damaged that we had to transfer the cattle into *to* other cars. It was in both sections that we had to get 10 additional cars. The side track was on the north of the main track. I don't suppose it was more than two minutes after the collision occurred until I saw the wreck. The engine, when I saw it, was lying upon its side with its front almost touching the fence. The car behind the engine in the second section was thrown across the track, and I believe was one of the three was burned up. These cars, after the cattle were taken out, three of them, I think, were taken out to the side and burned. In a majority of the cars in which I examined—and I examined them all as quick as I could do so—I found that the cattle were in a very bad condition; that a great number of the ropes by which the cattle were tied to the cars were broken, and a lot of the cattle were down and others standing on top of them.

95 Question. How long were you detained at Nankin in consequence of the accident?

Answer. The accident occurred between 4 and 5 o'clock on

Sunday morning, and we did not get away until Monday morning following.

Question. Are you acquainted with the value of that class of cattle and kind of cattle in this country about that time?

Answer. I am.

Question. State what, in your opinion, were the four head of cattle killed and the three crippled worth.

Answer. My opinion is that the animals were worth from $500 to $1,000. One bull, called the "Banker," was worth $1,000; the heifers I value at from $500 to $800 each. My recollection is that the animals killed were heifers, and that of the three left there two of them were bulls and one was a heifer.

Question. State whether any of the cattle that you brought on were injured or bruised; and, if so, how many and in what way.

Answer. I saw several that were badly injured. One bull, Lord William, had one of his hind legs sprained or bruised so that he could not use it, and we had to help him into the car. There was another 2-year-old bull was hurt across his loins. There were several that showed symptoms of being hurt, but these two
96 were injured the worse.

Question. State what kind of accommodations they had at Nankin and how the cattle were treated.

Answer. The cattle could not be treated well there. They could not get any water there all Sunday and had none until Monday afternoon. The wreck was such that it destroyed all their feed, and they got fresh feed at the same place where they got water.

Question. Was there any other accident or unusual delay until they got to Mt. Leonard?

Answer. No.

Question. What time did you get to Chicago?

Answer. I think Tuesday afternoon, and we left the same evening for Mt. Leonard.

Question. State if you stayed at Mt. Leonard, and how long.

Answer. I stayed there from about the 21 or 22d of September to November 15th, with the exception of about 10 days or 2 weeks when I was absent in Kansas City.

Question. Where were these cattle put and how were they treated at Mt. Leonard?

Answer. The night we took them out of the cars we divided
97 them into two lots, one lot going to Leverett Leonard's farm and the other lot going to Willie & Abiel Leonard's farm. Two days afterwards we divided them equally, the bulls divided equally between the two places, and cows and heifers the same. I was there and helped to divide them. The first division, the bulls all went to Mr. Leverett Leonard's farm. In three or four days after this there were 57 head of cows and heifers sent to a farm 5 or 6 miles west. I don't know that I saw those 57 head any more. When the cattle were unloaded from the cars at Mt. Leonard some of them were stiff and showed signs of being hurt. I had full charge of those that were left on Leverett Leonard's place; about 100

head, I expect. I saw one cow, the second day after she got out of the car, lose her calf. Her name was "Empress of Peddeshill."

(Counsel of defendant objects to so much of the foregoing answer as relates to the cow losing its calf, for the reason that it is immaterial, and that the damages sought to be proved are too remote.)

Question. State if you know how many of these cows and heifers which were kept at Mr. Leverett Leonard's place aborted their calves, and about when did they abort.

98 (Counsel for defendant objects to the preceding question, for the reason that it is immaterial, and that the damages sought to be proved are too remote.)

Answer. My recollection is that there were over twenty that aborted their calves during the time I was there.

Question. Do you know whether those on the other places lost their calves?

Answer. I do not.

Question. Do you know whether the cows and heifers shipped from Scotland were served by bull before they left, and were in calf?

Answer. Yes, I do. All the heifers and cows over 2 years of age were in calf before they left Scotland.

Question. State whether you have shipped any of the same breed of cattle from Scotland to this country since then, and when and how many.

Answer. Yes; I shipped 95 head on the 5th of November, 1884, from Glasgow to Boston.

Question. Judging from your experience as a shipper of this class and blood of cattle from Scotland to this country, would the trip across the ocean and detention in quarantine and shipment by rail to Missouri cause cows to prematurely lose their calves or

99 abort them, if no unusual accident had occurred to them?

(Defendant's counsel objects to the foregoing question upon the ground that it is a matter of opinion, and that it does not appear from the evidence that he has had sufficient experience in that business to be an expert.)

Answer. It would certainly not.

Question. Have you known of other cows in calf being shipped from there to this country? And, if so, state whether the trip has caused them to lose their calf or abort.

(Counsel for defendant objects to the foregoing for the reason that it is incompetent and irrelevant.)

Answer. Yes: I have known of others being shipped and without losing their calves from the effects of the shipment.

Question. How many shipments have you known to have been made?

Answer. I have known of 6 or 7 shipments from Scotland to America. Shipped from my own farm in Scotland. The most of these shipments were heifers in calf before they left, and I have

never heard of any abortions except in the Leonard & Estill shipment. I only personally accompanied one lot of stock beside
100 the Leonard & Estill shipments.

Question. State what experience you have had in shipping cows by rail, and the effect of such shipment on cows in calf.

Answer. My experience is that we ship cattle in Scotland all the time. From the 1st of April to the 1st of November there are agricultural shows or fairs in different parts of Scotland & England. All cows and heifers showed must be in calf. For 7 years I have had experience in shipping them by rail to these different places, and no cow nor heifer has in that time lost her calf from the effects of the shipment.

Question. You stated in your deposition that your home was in Scotland, I believe.

Answer. Yes, sir.

Question. Is your sojourn in this country to be permanent or only temporary?

Answer. Only temporary.

Question. When do you expect to leave this country for Scotland?

Answer. About the last of the month.

Question. When did you last reach this country?

Answer. The 22d day of November, 1884.

Question. Are you related in any way to any of the parties to this suit, or have you any interest in these suits?

101 Answer. I am not related to any of the parties nor interested in the suit in any way whatever.

Cross-Ex.

Cross-examined by defendant's attorney:

Question. You came over with the Leonard and Estill cattle in the employ of the Messrs. Leonard & Estill and under pay from them, and remained in the employ of the Messrs. Leonard up to about the 21st of November, 1883, when you returned to Scotland, did you not?

Answer. Yes; I came over with the cattle from Scotland and remained until the 15th day of November. I was in the Messrs. Leonard & Estill employ.

Question. In the shipment of cows in calf in Scotland by rail, as spoken of by you, what was the distance shipped generally?

Answer. The farthest distance we ever shipped from our home in Scotland was 400 miles. The general distance was from 100 to 200 miles.

Questions. Are the accommodations in the cars there in Scotland for shipping cattle the same or better than they are in this country?

Answer. The accommodation in the cars is not any better than here, but the track is smoother and there is not as much jar as on the cars here.

Question. The only personal knowledge you have as to
102 whether cows abort their calves in crossing the Atlantic is confined to those that you personally accompanied, is it not?

Answer. Yes, sir.

Question. You stated in your examination-in-chief that all heifers and cows over two years of age of the Leonard & Estill cattle were in calf before they left Scotland. How do you know that?

Answer. I saw some of the cows served myself, and the others I learned had been from a book kept by the herdsmen, and not kept by me.

Question. How many of those cows and heifers are you able to swear that you saw served by bulls in Scotland?

Answer. I can't swear that I saw any at all. I saw cows & heifers served, but I mean to say that I cannot specify any particular number.

Question. State, if you can, how many of the 382 head of the Leonard & Estill cattle were cows and heifers and how many were bulls.

Answer. Of Leonard's lot they were 54 bulls; the remainder were cows and heifers, and I don't know how about the Estill lot; about a dozen bulls probably; remainder cows and heifers.

Question. How do you distinguish the difference between a cow and heifer?

103 Answer. A cow is an animal that has had a calf, and a heifer is a female that has not had a calf.

Question. State, if you can, how many of the Leonard lot were heifers.

Answer. There were all heifers except a few. I don't suppose over a dozen cows.

Question. Can you tell about how many heifers in the Estill lot?

Answer. My recollection is about one-third of females were cows and 2-thirds heifers.

Question. In your testimony-in-chief you state that your recollection is that about 20 of the cows left at Leverett Leonard's aborted their calves whilst you were there. State how you know this.

Answer. Because I saw them.

Question. State, if you please, what cows and heifers they were, giving their names, if they had names, and the date that each one aborted.

Answer. About the names, I can't give them, because I don't recollect them, and I don't remember the dates they aborted.

Question. Did you see, yourself, the calf or fœtus that came from each one of these 20 cows or heifers?

Answer. Yes; I did.

Question. What was done with it?

Answer. I took them myself and covered them up, with the

104 exception of one or two that were so small; one not larger than your hand. Some bird or something eat those two up. I think they were two; am not certain.

Question. Can't you give some idea about when these abortions occurred?

Answer. They occurred from the time I got to Mt. Leonard until the time I left there, about the 15th of November. They scattered all along during this period.

Question. Did you take personal charge and dispose of these aborted calves?

Answer. Yes; I took special charge of that.

Question. Did any one assist you?

Answer. No.

Question. Did you have the sole charge of this 100 head of cattle that you have spoken of of Leverett Leonard's during the time that you were there?

Answer. Yes.

Question. Where were they kept?

Answer. They were kept on the farm in separate pastures. They were kept in 4 different pastures.

Question. About how many in a lot?

Answer. They were divided in about equal parts, and they were kept that way during the time that I remained there.

Question. Were these four pastures adjoining each other?

105 Answer. No; none of them adjoin each other.

Question. How far were they apart?

Answer. Two of them about a quarter of a mile apart and the other two join. The cattle were kept in the same pasture all the time and not shifted from one to the other.

Question. Did abortions occur in all 4 of these pastures?

Answer. Yes.

Question. Can you tell how many occurred in each one?

Answer. No; I cannot.

Question. Did you see any of these cows or heifers in the act of aborting their calves?

Answer. Yes; I did. I saw several.

Question. How many?

Answer. I don't remember.

Question. What did you do with those cows that aborted their calves?

Answer. I let them stay where they were.

Question. They were not removed from the pasture, were they?

Answer. No, sir.

Question. Where did you put the aborted calves?

Answer. I put them in a ditch or ravine in the pasture where the cows were.

Question. Did you bury them?

Answer. I put some rubbish on top of them—manure it was—that had been hauled out there.

106 Question. Did you report these abortions to Mr. Leonard or either of them?

Answer. Yes, sir.

Question. Did they give you any instructions as to what to do with the cows or calves?

Answer. I don't remember of any.

Question. Did anybody see those aborted calves beside yourself that you know of?

Answer. Yes; Mr. Leonard himself saw the most of them before I had put them away—Leverett Leonard it was.

Question. Those cows all had names by which they were known and you knew then which cows had aborted their calves, did you not?

Answer. At that time I did not know the name of the cows separately. They all had names by which they were known, and I knew which cows had aborted their calves. The cows are all numbered on the ear and hoof and this number corresponds with the name in the catalogue and you can go to the catalogue and get the name, and without doing that you don't know the name of the animal.

Question. You did not take the trouble to ascertain the names of these cows that had aborted their calves, did you?

Answer. I did not.

107 Question. Did Mr. Leonard do that, so far as you know?

Answer. No; I don't think he did, as far as I know.

Question. Can you fix the exact number of the cows that aborted their calves out of that 100?

Answer. No; I don't know the exact number.

Question. Can you tell the date when the first cow of that 100 aborted?

Answer. The second day after the cattle arrived at Mt. Leonard.

Question. Was that after the cattle had been separated?

Answer. It was on the same day, but after they had been separated.

Question. Do you know what cow that was?

Answer. Empress of Pedderhill.

Question. In your examination-in-chief you say that you saw one cow, the Empress of Peddeshill, lose her calf. Why do you say you saw that one if you saw others lose their calves.

Answer. The reason of it is that she had been at our place for over a year and I was familiar with her.

Question. How long after that did another cow abort?

Answer. In a day or two.

Question. How were these cattle fed after their arrival at

108 Mt. Leonard, and what were they fed on?

Answer. They were fed during the time I was there on cracked corn, bran, and oil-meal.

Question. Was that fed to them dry?

Answer. Yes, sir; some three times a day and some twice a day.

Question. How much a head was given?

Answer. I give them what I thought was right. We had no rule about feeding them; fed to them in the pasture.

Question. Did you ever see Mr. Baldwin, of the Erie railroad?

Answer. I don't know him. I saw two men who came there in the interest of the Erie road. Mr. McCullough was one of them.

Question. Did you show them these cattle or the cattle that are claimed were wrecked on the train?

Answer. No; I did not show them.

Question. Who did, if anybody?

Answer. I suppose Mr. Leverett Leonard. I saw Mr. McCullough

and him together. I did not go around with them amongst the stock.

Question. How long was that after the cattle arrived at Mt. Leonard?

Answer. I do not know.

Question. You say that when the cattle came off the train
109 at Mt. Leonard a good many were stiff and showed signs of being hurt. Do you know how those cattle turned out?

Answer. I don't recollect; I remember one bull—every day that I saw them he was getting weaker. He was running out loose, at liberty to go into the barn if he wanted to.

Question. During the time you were at Mr. Leonard's was any veterinary physician or surgeon called in to see these cows that were aborting their calves?

Answer. No, sir; there was not. As far as I know, I don't know of any.

Question. Is it not a fact that the first section of the train, with the exception of three or four of the rear cars, went on from Nankin Sunday morning soon after the wreck?

Answer. Part of it went on in the forenoon some time. I don't know how many cars went on.

Question. Did not all of the cars in that section in front of the box car in which you were go on with that train?

Answer. I don't think that the car next in front of the box car went on. I think it was smashed.

Question. Can you state how many cars were in the first section at the time of the collision?

110 Answer. I can't say as to the exact number. I think, 15 or 16.

Question. Where were you and what were you doing at the time the collision occurred?

Answer. I was in the box car asleep.

Question. What was the first thing that you did when you got out of the car?

Answer. The first thing I did was to remove a heifer from under the car—the box car—and the wheel was on her hind leg.

Question. What was done with that heifer?

Answer. She was left there.

Question. How was she injured?

Answer. She could not put one of her hind legs on the ground; it was broken and she had to go on three legs. Another reason was, I thought she showed symptoms of aborting.

Question. That heifer was the worst injured of any of the heifers that was not killed?

Answer. Yes, sir.

Question. Do you know which car that heifer was in?

Answer. I do not know.

Question. Do you know whether that was Mr. Leonard's or Estill's?

111 Answer. It was Mr. Leonard's, because it was a Galloway.

Question. What was the next thing that you did after getting this heifer out?

Answer. I went to relieve two bulls; one was hanging by the ring, and the other hanging by a rope. They were in the car, and the car had turned over. They were fastened in there. I got them out and I got some ropes and tied them up to the fence. One of them was injured; Lord William was his name. The other one was a polled Angus bull—"Jingo;" his nose was torn. Lord William was a Galloway.

Question. Were these two bulls left there?

Answer. No; these were taken on.

Question. Do you say that these two bulls were seriously injured?

Answer. Lord William was; it was in his lower joint of his hind leg; it was very bad injury; it was not visible.

Question. Do you know he recovered from that?

Answer. I do not. He was improving when I last saw him.

Question. Where were the other cattle that were in the broken cars?

112 Answer. Lying about the wreck.

Question. How many cattle were there in a car?

Answer. The first car behind the box car were all bulls and ten of them, and the next one to that were all heifers—14 in all.

Question. Where were the two bulls that were left at Nankin—where did you find them?

Answer. They were both lying outside the car. I think the rings were out of their noses. Banker was standing on his fore feet when I saw him first. The two that were left was Banker, and I don't know the name of the other one.

Question. How old was Banker?

Answer. 3 years old past. He was a Galloway.

Question. You fixed his value at $1,000?

Answer. Yes, sir.

Question. What do you base that on?

Answer. I base it on his pedigree and appearance. He was a good stock bull.

Question. Do you base that upon any sales within your knowledge in this country, or is it your opinion as to what he ought to be worth?

113 Answer. My opinion is not based upon sales, but upon his breeding qualities and his appearance.

Question. Had you at that time knowledge of any sales in Missouri of animals similar to this one?

Answer. No, sir; I had not.

Question. Have you since that?

Answer. No, sir.

Question. Have you knowledge of sales of the same breed of cattle?

Answer. I have.

Question. Do you know of whom Leonards purchased this bull, Banker, in Scotland?

Answer. Yes, sir; he purchased him from my father.
Question. Do you know what he paid for him?

Counsel for plaintiff objects to the foregoing question as being incompetent and irrelevant.

Answer. I don't exactly know what he paid for him.
Question. Were you present when the trade was made?
Answer. No, sir; I was not.
Question. How many of these cattle did the Leonards purchase from your father?
Answer. Somewhere over 150 head.
Question. Were they all Galloways?
Answer. Yes sir.

114 Question. Do you know what they paid or were to pay for this lot?

Answer. I do not.
Question. Did you ever hear that from either of the Leonards?
Answer. No, sir.
Question. What price did you fix on the other bull that was left at Nankin?
Answer. I fixed the price of him at $600. He was a Galloway; he was 2 years old.
Question. Was he one of the lot purchased from your father?
Answer. Yes, sir; he was.
Question. What do you base that value on?
Answer. On my experience of buying and selling Galloway cattle and selling Galloway cattle in this country. This valuation is based on sales of Galloway cattle in this country. I don't consider a public sale a fair basis of a value for cattle.
Question. What was there about this animal as being superior to others?
Answer. He was a well-bred animal and a good individual.
Question. Was he more valuable than the average of the bulls of that kind?
Answer. About a shade more.

115 Question. Do you know what the average price for which Galloway bulls sold in Missouri or Illinois in 1883 or 1884?

Answer. I don't know.
Question. Did you bring over some Galloway bulls in your lot?
Answer. I did.
Question. How would this one compare with them?
Answer. He would compare with the best I had.
Question. How did you sell your stock, at public or private sale?
Answer. By public sale, except one which I sold privately.
Question. When and where did those sales take place?
Answer. They were in Kansas City, on April 15th, 1885.
Question. What was the average price per head for which they sold?
Answer. 50 head averaged $287.10.
Question. What were they, bulls or heifers?
Answer. All bulls but 6. Five were heifers and one was a cow.

Question. What did the rest of them average?

Answer. They were not sold.

Question. Do you say that you have a claim against this company for cattle injured?

116 Answer. Yes, sir. It is for a bull that got out of the car door. The door was knocked open at Quaker street, on the Delaware division of this road. While the door was open the bull got out, and some of them shut the door and left him out. The conductor told him he saw him, and thought it was a bear. I went back and saw the bull afterwards. He was very badly bruised. I wrote to Mr. Sheppard, agent for the N. Y., L. E. & Western Railway Co. at Boston, making a claim for the loss of this animal, which they have not adjusted. I don't feel that they have done right about it.

Question. How many of the cattle were unloaded and reloaded at Nankin, and how many of them were bulls and how many were cows and heifers?

Answer. I don't recollect the exact number. There was one car of bulls, and the remainder were cows and heifers.

Question. Did these cattle belong to Leonards or to Estill & *et al.*

Answer. Most of them belonged to Leonards.

Question. Where were these cattle after they were unloaded?

117 Answer. Five or six of the cars were so badly wrecked that the cattle were knocked out, and a farmer gave us permission to place them in a pasture until we could reload them. The remainder of these cars we let the cattle remain in them until we placed them in other cars.

Question. Do you mean that all the cattle were knocked out of these cars?

Answer. Some were and the remainder were took out.

Question. Was there any water in the lot so they could get it?

Answer. No; there was not any.

Question. Were they all put into one lot—those that were turned out?

Answer. All except the bulls; they were tied to the fence.

Question. You spoke of examining the cars after the accident. How soon did you do that?

Answer. About a half an hour.

Question. What injury did you find had been sustained by those cars in the first section that were in front of the box car in which you were sleeping?

Answer. I found that the car next in front of the box car was one of the cars that was smashed. I saw that some of the cars

118 had bruises and showed that they had been smashed.

Question. Did you notice anything wrong with the cars in the section beside those that *that* the cattle had been transferred from?

Answer. I saw marks on some of them.

Question. Did any of these cattle die at Waltham?

Answer. Yes, sir; there were two heifers.

Question. Do you know what caused their death?

Answer. I think they got hurt in coming out in the cars from Boston to Waltham.

Question. Were either of these animals opened?

Answer. I think not; they were buried. If it was done it was done without my knowledge.

Question. Were any of the cattle opened at Concord?

Answer. Yes, sir; one was opened by two men under me.

Question. Was there any one else present?

Answer. Yes, sir; Dr. Childs was present.

Question. Anybody else?

Answer. There were three of my men and Dr. Childs and
119 the man one of my men boarded with—Maker was his name.

Question. Don't you know that one of the cows or heifers of this lot lost a calf either at Waltham or Concord?

Answer. No, sir.

Question. Did you have any cattle sick before you discovered they had taken the Paris green except the two you have referred to?

Answer. No, sir.

Question. Was there any marks of violence on these two that died at Waltham that made you think they were injured in the cars?

Answer. No; there was no marks, but they were down in the cars when we took them out.

Question. Wasn't it extremely warm weather when these cattle arrived at Boston?

Answer. Well, it was pretty warm. It was not intense. It was at night when we arrived.

Question. Wasn't the cattle suffering from heat on the vessel?

Answer. No; they were not.

Question. How long was it from the time the cattle were unloaded until you got to Waltham?

Answer. We commenced unloading about 7 and got to Waltham between 1 and 2 the next morning.

120 Question. What was the character of the accommodation for the cattle at Waltham?

Answer. It was very good, but not enough for that number of cattle. It would reasonably accommodate about 150 or 200 head.

Question. Didn't the cattle suffer from that cause—from being overcrowded?

Answer. I don't think they suffered very much from it. They were well attended to. They were overcrowded, but don't think it done them any harm. They were not there long enough.

Question. Did not Messrs. Leonard & Estill complain about the accommodation?

Answer. Well, they said that it was not good enough for the cattle.

Question. Did they not go on to Washington to get some relief?

Answer. I don't know whether Mr. Leonard went at that time or whilst he was at Concord to see about getting the cattle away.

Question. Is it not a fact that there was not shed room enough at Waltham and part of them had to stand out in the sun?

Answer. Yes, sir.

Question. You say those cattle passed the examination at
121 quarantine when they were unloaded from the steamer. Who made that examination and what was it for?

Answer. The cattle were examined by Dr. Thayer to see if they had any disease.

Question. Could the cattle lie down in the position they were placed on board the ship?

Answer. Yes, sir; they could.

Question. You say that five head of the cattle died from eating Paris green. How long was that after that you discovered that they had eaten it?

Answer. Some of them were died before I discovered it.

Question. What time elapsed between the death of these five head?

Answer. Between Friday and Sunday.

Question. How did you know that the three heifers that died were with calf?

Answer. They had been served in the old country and a register was kept of their service, and during all the time that I saw them I saw no signs but what they were in calf.

Question. Was the one that was opened examined as to whether it was with calf or not?

Answer. I don't think it was.

Question. Were any veterinary surgeons or physicians called in to attend these cattle either at Waltham or Concord?

122 Answer. There was none at Waltham, but I sent for Dr. Childs at Concord.

Question. Dr. Thayer and Dr. Rose were Government physicians, were they not?

Answer. Yes, sir. They were at Waltham during the time the cattle were there. They were also at Concord.

Question. What were the four heifers killed and the one injured and left at Nankin, Angus or Galloways, and how old were they?

Answer. They were all Galloways, and all over 2 years of age.

Question. What was their character and quality of the same breed in that shipment?

Answer. These heifers—an average lot.

Question. When you say they were worth from $500 to $800, what — you base your knowledge on?

Answer. I base my opinion on the sales I have seen in this country. This shipment was the best I have ever known of being made of Galloways.

Question. What sales in this country do you refer to when you say you base your opinion on sales?

Answer. One sale was made by A. B. Matthews at Kansas City in the spring in 1882 or 1883. The average was consider-
123 able over $500 a head and the animals were a little over a year old.

Question. Don't you know the price of these cattle declined after the year 1882 and the spring — 1883?

Answer. There was a certain class of them that went down, but the best of them are higher to-day than they were then.

Question. Don't you know at all the public sales since the spring of 1883 the price has been lower?

Answer. They have been lower at public sales.

Question. Did any of the 100 head of cows and heifers of which you had charge on Mr. Leverett Leonard's place show any visible signs of injury?

Answer. I did not see any that showed any outward signs of injury that I remember of.

Re-examined.

Re-examined by plaintiffs' attorney:

Question. You speak in your cross-examination of having made a public sale of Galloway cattle at Kansas City on the 14th of April, 1885, at which you realized an average of $287.10 a head. State whether or not this sale was made at a time when there was great excitement about pleuro-pneumonia among Missouri cattle and when the Western States and Territories were quarantined
124 against cattle from this State; and, if so, what effect these facts did have on the price of cattle at the time of your sale.

Answer. The sale was after the excitement about pleuro-pneumonia had arisen. I am not sure whether the Western States had quarantined against Missouri, but there was a great deal of talk to that effect, and it was ruinous to a sale of thoroughbred stock or a sale of any kind of cattle.

Question. State the price of the bulls sold by you at that sale or any one of them that you remember.

Answer. The highest price at that sale was $605, paid for Marksman of Drum Laurig; another one was British Hill, who brought $510. Several brought $400; the remainder down to $200.

Question. How did the bull that sold for $605 compare as to value and age with the young bull left at Nankin?

Answer. They were both the same age and, I think, about the same value.

Recross-Ex.

Recross-examination by defendant's counsel:

Question. When did you bring your cattle that you sold on last April into Missouri?

125 Answer. They got to Kansas City the night of 24th of February, 1885.

Question. When did you first hear about pneumonia?

Answer. About the 1st of April.

Question. When did you advertise your sale?

Answer. Before I heard anything about pneumonia.

Question. Did you withdraw any of your animals from the sale?

Answer. I sold them all.

Question. Did you hear anything about pleuro-pneumonia excepting among Jersey cattle?

Answer. The first I heard was that it was among the Jersey stock; never heard of it being among other cattle in Missouri.

Question. What States or Territories quarantined against Missouri cattle?

Answer. Colorado quarantined against it. New Mexico quarantined against it also.

Question. Was the sale of your cattle correctly reported in any papers?

Answer. Yes, sir; it was reported in the Breeders' Gazette and two Kansas City papers.

JOHN CUNNINGHAM.

Subscribed and sworn to before me on the day, at the place, and between the hours first aforesaid.

126 [SEAL.] LOUIS L. WILLIAMS,
Notary Public.

Testimony of W. R. Estill.

W. R. ESTILL, sworn on the part of the plaintiff-, testified as follows:

Direct examination by JOHN COSGROVE, Esq.:

Q. You are one of the plaintiffs in this case, are you—in the case of Estill and others?

A. Yes, sir.

Q. How many cattle at the time of this accident were you the owner of, you & Estill & Elliott?

A. Sixty-eight.

Q. The parties interested. Who are they?

A. A. H. W. Elliott, my brother, Wallace Estill, and myself.

Q. They are plaintiffs in the case?

A. Yes.

Q. I will get you to state whether you went to Scotland.

A. Yes, sir.

Q. When?

A. I think we started from America about the 17th of May.

Q. What year?

A. 1883; left here about the 17th of May, 1883.

Q. For what purpose did you visit Scotland?

A. We went there for the purpose of purchasing polled Angus cattle.

Q. Did you purchase or not these cattle in controversy there—sixty-eight?

A. Yes, sir; we did.

Q. How were they sent from Scotland? First state what
127 kind of cattle they are.

A. Polled Angus cattle; registered polled Angus cattle; polled Aberdeen and Angus.

Q. Are they considered common cattle or bred cattle?
A. They are considered high-bred cattle.

(By Mr. POLLARD:)

Q. You mean these you owned?
A. Yes, sir.
Q. These cattle you allude to?
A. These cattle we purchased are the cattle.

(By Mr. COSGROVE:)

Q. What were the sixty-eight head of cattle you purchased?

Mr. POLLARD: I object to that kind of testimony.
The COURT: What is the question?
Mr. COSGROVE: The question is, Were they common or bred cattle?
The COURT: You may answer the question.
WITNESS: They were high-bred cattle.

(By the COURT:)

Q. You are a dealer in cattle, are you?
A. Yes.
Mr. COSGROVE: I will ask what is your business.
A. I am a farmer and——
Mr. POLLARD: I would like to ask him a question in relation to how that is determined.
The COURT: You will have an opportunity to do that on cross-examination.
128 Mr. POLLARD: I want to have the opportunity to raise the question of the testimony as to how the breeding of cattle is proved; it cannot be proved by hearsay.
The COURT: Ask him such questions as you wish to on that subject.

(By Mr. POLLARD:)

Q. How is that determined?
A. A register is kept of the cattle, when bred and who bred to.
Q. That is the mode of determining?
A. We determine the breeding from the record kept of her.
Q. That is one way you have?
A. Yes, sir.
Q. And by what else?
A. By the general appearance of the cow I see whether she is a good individual or not.
Q. You cannot tell from that whether the animal is thoroughbred?
A. No, sir; a register is kept.
Q. Your only means of determining is the herd book or register?
A. Yes, sir.

Mr. POLLARD: I object to his stating that.

(By Mr. COSGROVE:)

Q. Can you tell by looking at the cattle whether they are in the herd book or not?

A. By looking at them?

129 Q. Yes.

A. No.

Q. By examining?

A. By examining them you cannot.

Q. It wouldn't be necessary for you to know the individual cattle or to make an examination of them before you determined whether they were in the herd book?

A. No; you have to depend on the veracity of the gentleman whether he is selling you registered animals or unregistered.

Q. Did you take his word for it?

Counsel for defendant objects.

Q. What is the color of these cattle?

A. Black, hornless cattle.

Q. Where did you buy them?

A. We bought them in the northern part of Scotland.

Q. For what purpose?

A. For breeding purposes and bringing home to sell.

Q. To bring where?

A. To Missouri; bought these in Scotland to bring to Missouri to use on our farm and for breeding purposes.

Q. I started to ask you a moment ago what your business was. You answered you were a farmer.

A. I am a farmer and stock-raiser and have been raised on a farm where there was stock raised all the time ever since I was born.

Q. What was your father's business?

130 A. Farming and stock-raising.

Q. How long had he been engaged in the stock business?

A. I judge thirty or forty or fifty years.

Q. Where is the native home, if you know, of these black cattle, polled Angus?

A. In Scotland, the northern part of Scotland, in Aberdeen. Aberdeenshire, I believe, is their original home.

Q. Name the city you shipped them to from Scotland.

A. From Liverpool to Boston.

Q. Did you ship them to Liverpool first?

A. Some of the cattle were collected in Aberdeen and some of them at Newcastle. The cattle were to be delivered to us at Liverpool.

Q. From Liverpool to what port in the United States were they shipped?

A. To Boston.

Q. Do you know when they arrived at Boston?

A. Yes, sir; I was on the ship; accompanied them over.

Q. What kind of a voyage was that?

A. We had a very pleasant voyage, indeed—no wind or anything to cause any trouble.

Q. Did the Leonard cattle cross the ocean on the same vessel?

A. On the same vessel.

131 Q. Just tell the jury how the vessel where the cattle were was arranged.

A. Well, it is a large vessel, I suppose 600 feet long or longer. The lower deck had stalls like a stable. There were two decks—the upper and lower deck. The cattle were principally confined to the upper deck. They were fed and watered and cleaned off just like they were in a stable.

Q. Were they all tied in or were there partitions?

A. Partitions.

Q. Or stalls?

A. As I say, stalls. Some places would take two or three and some four in a stall, owing to how large or small the cattle were.

Q. You say you had a pleasant voyage; was it close?

A. No, sir; very pleasant.

Q. Explain to the jury whether the port-holes were closed.

A. The entire vessel was open; the hatches were not closed the entire trip.

Q. Did they all reach this country?

A. Yes, sir; no loss on the voyage anywhere.

Q. How many days were they in transit from Liverpool to Boston?

A. Twelve days.

Q. Do you know what time they reached Boston—what day?

132 A. They reached Boston on the 12th of July about seven o'clock—six or seven o'clock, somewhere.

Q. What was done then?

A. The inspector of the port came on board with a veterinary to inspect the cattle before they could be landed. He went all over the cattle to see that there was no contagious disease on board. After he had inspected them we proceeded to unload them. We got one of the old ones out and the rest followed it; came out one or two at a time. They were from there put on the cars switched right up to the side of the dock. The railroad, I judge, runs right alongside the wharf. They were put in box cars, and from the box cars they were taken to quarantine station.

Q. Where is that?

A. At Waltham.

Q. How far out?

A. I judge about eight or nine miles.

Q. Were you with them?

A. Yes, sir; I was, the entire time.

Q. How long did they remain at Waltham?

A. I left them after they got to Waltham. After two or three days I came home.

Q. Were any injured or lost on the way from the vessel to Waltham? If so, how many?

A. Yes, sir; I think there was one or two of the Leonard

133 cattle that died from suffocation.

Q. Any of the Estill & Elliott cattle died?

A. No, sir; no loss—no injury to our cattle.

Q. You say they reached Waltham. How long did you remain after they reached there?

A. I am not certain. I think they stayed some six or eight days. I couldn't be certain about that. I came on home myself.

Q. Did you go back again?

A. Yes, sir; returned. I think I left for Boston about the 1st of September and went to Concord. The cattle had been moved from Waltham over to Concord, to another station, where they had quarantine.

Q. You say you returned from Missouri to Waltham, Massachusetts. You reached there what time?

A. I think I reached there somewhere between the 4th and 5th of September.

Q. How long did you remain there then?

A. Remained there till the 12th.

Q. What condition were the cattle in when you returned from Missouri to Concord?

A. They were in good condition.

Q. State whether any of them were sick or not.

A. No; I saw no sick cattle.

Q. Do you know how those cattle were kept there at Concord? Were they all kept in the same field or compartment?

134 A. I think there were four compartments. The cattle were contained in four different lots. A road separated the two lots. There was a staked road or some road. Two lots of cattle were on the south side of the road, if I recollect right, and two lots of cattle were on the north side of the road.

Q. Those on each side of the road, how were they divided?

A. By lines on each side by a partition fence.

Q. Were the bulls kept separate from the females?

A. Yes, sir. There were some cattle kept in the barn; some bulls kept in the barn also.

Q. Where were your cattle?

A. Our cattle were kept, if I recollect right, on the south side of the road. I could not give the direction—the exact location. They occupied one part of the farm.

Q. Were they kept with the Leonard Bros.' cattle or separate?

A. They were kept separate from the Leonard Brothers' at that time—at the time I arrived there.

Mr. POLLARD: When you were there?

WITNESS: Yes, sir.

Q. State whether you saw the cattle at that time.

A. I did.

Q. With whom did you make the contract for the shipment?

A. Mr. Leonard made the contract.

135 Q. Did you see the gentleman?

A. I saw the gentleman; was with him at the time. I couldn't remember his name.

Q. Did this gentleman see the cattle?
A. Yes, sir.
Q. Did he know where they were going to?
A. Yes, sir; Howard county.
Q. Knew where they were destined for?
A. Certainly. He had the shipping of them.
Q. Then, you say, you left Concord. Did you say you came with the cattle?
A. Yes, sir. I came with the cattle.
Q. How far?
A. I came to Chicago.
Q. Where were you when the collision occurred at Nankin, Ohio?
A. I was in the rear train, in the caboose.
Q. Explain, Mr. Estill, to the jury the direction that railroad runs at Nankin—that is to say, does it run west?
A. It was running west there.
Q. East and west?
A. East and west. The road runs east and west. We had run as one train all along; one train carried the entire lot of cattle till we got to Kent, Ohio. I am not certain about the place they were divided. They were divided into two trains or sections—about equally divided, I think. The first train ran onto the switch and
136 was standing, and they left the switch open for the second section to come in, to allow a passenger train to pass. I judged that was what it was for. I don't know that, and the train came down—the rear train—came at a terrific speed and run into the train standing on the track in the rear. A tail-end collision, I believe, they call it.
Q. Where were you at that time?
A. I was in the caboose at the time of the collision, on the rear train.
Q. The rear section. What was the character of the shock, or effect? How did you ascertain there was a collision?
A. The shock, of course, that accompanied the collision was terrific. The shock we received woke everybody in the caboose; woke all the men, scattered them, knocked them off their seats. We jumped out of the bins, and, as soon as we could, got out. It was about break of day—about 4 o'clock—between 4 and 5. The first thing we saw was the cattle; were all piled out on all sides of the track; the cars were piled up; the driver of the engine was on the line on one side, the tender on the other. I ran down; we knew we had some Scotchmen in the first train and we thought
137 they were probably killed. I saw they were safe, and then we all proceeded to unloosen & get the cattle out of the wreck as fast as we could, and straighten them up the best we could.
Q. How did you find the cattle?
A. Well, the cattle, there were four of them under the engine; three were dead; one of them had its ribs broken and soon died or was killed by the section men to get her out of her misery. One

car filled with bulls telescoped. The bulls were standing, some held by the neck, some by the nose. One was caught by the feet and held. One of the cars careened; the rest of the cars, a good deal of them, I think nine or ten, were jammed in the ends, the draw-heads knocked out, the ends of the cars crushed. We had the cattle put in the cars, about ten or twelve to a car, and we had partitions, and five or six cattle on each side of the partition. They were 2 x 6 scantlings, three of them, and the space between the doors was used for feeding and watering the cattle. Those scantlings were all broken up and torn down.

Q. How were these cars in which these cattle were shipped, all in one room, so to speak, or were they divided by partitions into stalls?

138 A. As I tell you, there were these scantlings, 2 x 6 scantlings, on each side of the door, and the cattle were put in on each side, from five to six to a side, and troughs were in there to feed and water them; they were fed in the space left between the two doors in the cars. The feed was in there and the water, the water being got as we went along.

Q. About how many head were put in each car?

A. From eight to ten to twelve, owing to the size of the cattle; perhaps more.

Q. After the collision how long were you detained, any length of time at Nankin?

A. We were detained about 26 or 28 hours, I judge.

Q. What time did the accident occur?

A. About four o'clock Sunday morning; we didn't get away till about 7 or 8 o'clock the next morning.

Q. How were you situated with reference to feed and water for the stock during your stay there?

A. The cattle that remained in the cars, we could not unload them because there was no platform there to unload. Those that were already thrown out of the car we turned into a pasture, or rather a field—no water in it, though. The other cattle that

139 remained in these broken cars, they could not be removed; they had to stay just where they were.

Q. How many cars of stock were transferred into other cars?

A. Nine.

Q. Were they most in the forward section or in the rear section?

A. I think perhaps they were in the rear section; the behind section got a portion of them.

Q. How many?

—. I could not tell as to the position of the cars; they were so mixed I could not tell how they were.

Q. You left there on Monday morning, you say, at 7 or 8 o'clock?

A. Yes, sir.

Q. How long a time from that was it until you got where you could get feed and water for the stock?

A. The next afternoon about two o'clock; I don't know the name of the place; they ran us down there.

Q. Do you mean Tuesday afternoon, or Monday afternoon?

A. Monday afternoon. They ran us down to a place, and we got feed and water there.

Q. Did you not accompany the cattle to Chicago?

A. Yes, sir.

Q. When, if at all, did you discover anything, any injury resulting to the cows by way of premature births, to the cows or calves, or anything?

140 A. I judge it was on Monday evening I think I noticed the first cow that had aborted a calf.

Q. Was that the Monday evening after you left Nankin?

A. The Monday after the wreck.

Q. On the same day?

A. Yes, sir.

Q. What did you discover then?

A. I discovered this cow had aborted a calf in the car.

Q. Whose cow was that?

A. That was our cow, Estill & Elliott's cow.

Q. When next did you discover anything of the kind?

A. I could not recollect the time positively, between there and Chicago. I noticed there was another abortion in the car; another cow had lost a calf, aborted a calf.

Q. When did you reach Chicago?

A. We reached Chicago, I think it was either Tuesday or Wednesday. I would not be positive about the time we reached Chicago.

Q. To whom did this second cow belong?

A. Estill & Elliott. I had direct charge with my men of the Estill & Elliott cattle, seeing to them.

Q. Were you or not paying special attention to the Leonard cattle?

A. No; not paying special attention to the Leonard cattle.

Q. What became of them at Chicago?

141 A. They were brought on from Chicago over the Wabash to our place.

Q. How long did they remain in Chicago?

A. I think they remained there four or five hours; about as long as it would take to transfer them.

Q. Carried by what road?

A. On the Wabash.

Q. Did you or not accompany them from Chicago?

A. No, sir; I didn't accompany them from Chicago.

Mr. POLLARD: What do you mean by transfer? Transfer from one car to another?

A. No; the same cars they rode in from Nankin after the wreck came on home.

(By Mr. COSGROVE:)

Q. How many abortions did you see yourself before they reached home?

A. Before they were unloaded from the cars, after they reached our place, five in all I saw. There were three abortions since I left them at Chicago. I examined them before they were unloaded off the track. I could see them.

Q. Was there any examination made of those cattle by any person?

A. Yes, sir; as they were led out.

Q. Where at?

A. At Estill.

Q. Where is Estill?

A. Estill is in Howard county, Missouri, half way between Fayette and Booneville. As the cattle were brought out of the
142 cars they were inspected by three men we got to assess the damages. As they were brought out they looked over each one.

Q. Who were those gentlemen?

A. Mr. Nance, Mr. Marshall, and Mr. Tutt.

Q. I will ask you if you know how many of these cows in addition to the five you already named as having aborted did abort after they got home.

A. Well, after they got home they were not kept on my place; they were kept on my brother Wallace's place until some time about the 28th of November; then they were separated and part were brought on my place and part were left with Mr. Estill and my brother; but, in the meantime, there were a number of the cattle taken out and sold at Kansas City; what number I don't know. They were not under my supervision after that time—after they reached home—until the 28th of November; they never came under my special supervision.

Q. If there were any you can't tell?

A. Two happened after the 28th of November on my place—after the 28th of November there were two more happened.

Q. How many bulls did you have, you and Estill and Elliott?

A. Thirteen to fifteen.

143 Q. Were any of those injured?

A. Three of the bulls were injured, specially one of the bulls. The testicles were injured; swollen to a large extent. We could not sell him. We could not use him; could not get a calf. He was shipped to St. Louis.

Q. How long after the arrival there was it you discovered the injury to those animals?

A. At the time they arrived, when they arrived, as they were being inspected. The other two bulls were hurt in the loin. They wabbled about. The seemed to be in pretty good health, except they were crippled in the loins.

Q. The first bull, hurt in the testicles—what became of him?

A. In the division of the cattle Elliott & Estill got him, and he was shipped to St. Louis, I think. I won't be positive as to the disposition made of him after the division.

Q. Was he ever used as a bull?

A. No, sir; never used as a breeder.

Q. How about the other two?

A. The other two were crippled in the loins.

Q. What was done with those bulls?

A. They were disposed of the best we could at a reduction, because they could not serve cows.

144 Q. What experience, if any, have you had as to the value of that kind of cattle—blooded bulls?

A. I have bought some cattle prior to my going to Scotland.

Q. Black cattle?

A. Black cattle—polled Angus cattle. I bought some cattle prior to going there. My brother had bought some prior to my going there. I attended several sales of black cattle—one at Chicago and one at Kansas City.

Q. Were you acquainted with the market value or price of that kind of cattle at that time?

A. I thought I was; yes.

Q. I will ask, then, what would these three bulls have been worth if they had come home without any injury, in proper condition.

A. $500 apiece.

Q. What, in your judgment, were they worth in the condition they did arrive?

A. Worthless as breeders, owing to what they would bring as beef.

Mr. POLLARD: I object to allowing the witness to put an assessment on the value of the cattle. The proper way is to have him tell what the cattle were and describe the injuries. If he sold the cattle, that may, perhaps, show what the result of the injuries was. I don't think it proper for him to assess the damages on the animals.

145 The COURT: It is not necessary for him to assess any damages. He is asked as an expert what the value of these bulls would have been without these injuries, and then they follow that with the question, what, in his opinion, the bulls were worth in the condition in which they arrived. I don't know of any other way to arrive at the damages. Of course, his answer is an opinion; the question of value is always a matter of opinion. You may answer.

(To which ruling of the court the defendant at the time excepted.)

Ans. Just what they would bring for beef. I judge two and a half cents to three cents a pound.

Q. Can't you state in dollars and cents what they were worth?

A. From $25 to $50; what they would sell for for beef.

Q. Now, Mr. Estill, the five cows that aborted you know of, what would those cows have been worth per head had they arrived in good condition at that time?

A. I should judge they would have been worth $600. Females were a little bit higher than males.

Q. $600 each?

A. Yes, sir; $600 each.

Q. Mr. Estill, I want, if you know, to ask you how it affects

146 a cow for breeding purposes that has aborted her calf.

Mr. POLLARD: I object to that.

The COURT: I think there should be some further proof that he is acquainted with that subject before he answers.

Mr. COSGROVE: I ought to have done that.

Q. Have you ever known of cows that have aborted their calves?

A. Yes, sir.

Q. How much knowledge have you had on the subject?

A. Having resided on a farm all my life—spent my entire life on a farm—I believe I had seen from five to six or twelve abortions during a lifetime.

Q. Did you ever try to inform yourself as to the effect it has upon the breeding qualities?

A. Yes, sir; by personal experience. There is no book by which I could inform myself as to the cause of abortions, but the effect of abortions I could inform myself somewhat by personal knowledge.

Q. Have you had any knowledge of abortions except from those that have come under your personal observation?

A. Ask that question again.

Q. Have you had any knowledge of abortions except those you have spoken of as having observed on your father's farm?

A. No, sir; no other knowledge. My knowledge of abortion is from my own knowledge.

147 Q. From your own experience?

A. My own experience.

Mr. POLLARD: I don't think it proper to give that. I think this question of abortions is a question of medical science, and simple observation is not sufficient to qualify him as an expert to express an opinion upon that. He must either be one who has studied the subject scientifically——

Mr. COSGROVE: I will waive that question.

(By Mr. COSGROVE:)

Q. How did the fact that these cows aborted their calves affect their market value?

Mr. POLLARD: I think he must show he has some knowledge of that; he must show how he knows of the market value; he has to show whether he knows anything about it.

The COURT: He has already testified as to the market value of these cows without objection, providing they had arrived uninjured.

Mr. POLLARD: He says he knows that.

The COURT: He may know what a cow is worth that has aborted its calf; that is all he is asked at present.

Mr. POLLARD: I think he should know something about that—what cows in calf are worth.

148 The COURT: You may answer the question.

Mr. POLLARD: Then there is another thing: this collicion happened some five years ago; they are able to show exactly what the result was on those cattle—whether they turned out breeders; of course, it will depend on that; they may have turned out to be breeders, bred right along; they might have been barren; that is

knowledge in their possession; they are able to show exactly the result of each abortion, whether they turned out breeders.

The COURT: A cow that was received at that time—that was expected to have a calf within a month or two—might have a value which the witness, although not an expert on this other question, was acquainted with; whereas a cow not liable to have a calf that season might have another value that the witness also knows.

Mr. POLLARD: The point I make is that they are able, should be able, to show exactly what the fact was, whether she did have a calf or whether she continued barren.

The COURT: He is asked about five cows that, as he has already testified of his own personal knowledge, aborted their calves upon the journey; he has testified what the value of those cows
149 would have been if they had not aborted their calves; now he is asked, practically, what the value of those cows was at the point of destination, having aborted; it don't strike me that it necessarily requires a veterinary physician to answer that question.

Mr. POLLARD: He must know something of the value of an aborted cow.

The COURT (to witness): If you are able to state what the market value of those five cows you have referred to was at the point of destination in the condition in which they were received, their calves having been lost, you may state the fact.

Mr. POLLARD: In addition to that——

The COURT: He is not called upon by this question to express any opinion as to the effect the loss of a calf will have on a cow's powers of giving birth to calves thereafter. That is not the question.

Mr. POLLARD: It is all based on that. That is the real question, what is the damage to that cow? If they are able to show exactly what the result was now, we say that should be the testimony and that should be the rule of damages. He says the original
150 value of an aborted cow under those circumstances was $500 or $250. Suppose it turned out that cow sold for just as much as a cow that had never aborted, and they are in possession of that testimony, I say that is a fact they are bound to show—to procure the best testimony and not speculative testimony. That is speculative. When they can show the actual facts, show what was the result of the abortion—whether she was a breeding cow after.

The COURT: It is competent for you to establish all those facts on cross-examination.

Mr. POLLARD: The point I make is they are bound to show the best evidence when they have the actual facts. They want to come in here and show speculation when they can show exactly what the result was.

The COURT: I will let you show what the market value of these five cows was in the condition in which they were received.

(To the above rulings of the court on this question defendant then excepted.)

(By Mr. COSGROVE:)

Q. What were they worth in the condition in which they did arrive at the point of destination?

A. $250.

151 Mr. COSGROVE: Each? Now, Mr. Estill, those were five cows and three bulls we have spoken of. Do you know of any other injuries to any of the others of the herd of Estill & Elliott?

A. No; not personal knowledge, only what I have heard them say.

Q. You have no personal knowledge?

A. No; no personal knowledge of what happened on the farm. I left home soon after that; didn't return.

Mr. POLLARD: After what?

A. After the arrival of these cattle; ten days after the arrival of these cattle; didn't get back till two or three weeks, I believe; I was away from home a good deal.

Cross-Ex.

Cross-examination by Mr. POLLARD, for defendant:

Q. What was the condition of the weather when those cattle landed in Boston?

A. It was July; about the 12th of July; the weather was warm.

Q. Was it very warm?

A. No, sir; not oppressive.

Q. Was not the thermometer 98 degrees or 100 degrees?

A. I don't think it was; I never examined the thermometer.

Q. Wasn't it excessively warm, not only at that time but the whole of the voyage from Liverpool?

A. Not oppressively so, I didn't think.

152 Q. The cattle were all under deck?

A. Not under deck; there were three decks.

Q. Usually under deck?

A. Yes, sir.

Q. Not standing open?

A. Not standing up where the rain would strike them, but where the hatch-heads were open; some alongside the decks.

Q. How far were the decks apart?

A. I judge they were ten feet; they were fixed in case of a storm.

Q. You say that two of the animals died on the trip from Boston to Waltham; that was about eight miles?

A. Yes, sir.

(By the COURT:)

Q. Those were Leonard cattle?

A. Those were Leonard cattle.

(By Mr. POLLARD:)

Q. Did they discover those on the trips?

A. No; not until they were unloaded; when they were unloaded they discovered these cattle.

Q. They died in the car?

A. Yes.

Q. Was there any visible injury to the animals?

A. No, except they were dead.

Q. Any explanation of the cause of death?

A. It was, we thought, from the pitching of the cars and from suffocation.

Q. You were not able to determine?

153 A. No, sir; I was not an expert to determine the cause of death.

Q. How many died at Waltham?

A. I don't remember any deaths at Waltham. I left the city in a few days afterwards. I was not out about the yard a great deal.

Q. Don't you know there were one or two died there within a day or two after they arrived?

A. I don't know. After we reached Waltham I went back to Boston.

Q. How long did they remain at Waltham?

A. I judge eight or ten days.

Q. What was the nature of the accommodation for the cattle there?

A. Rather crowded; not sufficient for bred cattle.

Q. Didn't you find a great deal of fault with them?

A. Yes, sir; we found some fault.

Q. You found a great deal?

A. We found some.

Q. What was the objection to the accommodation there?

A. The principal objection was the crowding too many of our cattle together. We wanted separate places.

Q. They were all in one herd, were they not?

A. No; they were separated in different pens—pens that would accommodate 30 or 40 cattle.

154 Q. They were all in sheds?

A. Mostly in sheds—board fences. When we didn't have board fences we put planks across to make a fence.

Q. You had to erect a temporary structure?

A. Yes, sir. That only lasted for a few days.

Q. Mr. Leonard or you went to Washington?

A. It was not me. I guess Mr. Leonard went.

Q. Don't you know he did?

A. No; don't know it. I left Waltham.

Q. Was it understood amongst you that he should go before you left?

A. Yes, sir; it was understood he was to go.

Q. And try to get some more——

WITNESS: Accommodations.

Q. You know nothing about that?

A. After a time I returned to bring them home.

Q. You don't know what was done in the meantime?

A. No, sir. They were transferred—not until I got back there, about the 4th or 5th of September.

Q. How many of those cattle were bulls—of your lot?

A. 12 or 15 were bulls.

Q. The rest were what?

A. Cows, calves, and heifers.

Q. How old were the bulls?

155 A. The bulls were from eight months to 22 or 23 months.

Q. How old were the cows and heifers?

A. The heifers were six to seven months old. I believe the oldest cows were three years old; three or four.

Q. From six or seven months up?

A. Yes, sir; a few cows had calves.

Q. How?

A. Some of the *calves* had sucking calves.

Q. Are those included in this 67 or 68 head?

A. Yes, sir.

Q. How many of those were sucking calves?

A. I don't remember exactly how many were sucking calves. I think there were about 3 or 4.

Q. Sucking calves?

A. Three or four sucking heifer calves.

Q. Were any of those injured?

A. Heifer calves?

Q. Yes.

A. There was one calf injured on this trip; on- of those calves; it was a calf dropped in quarantine; one calf born after they came to quarantine.

Q. Have you mentioned that calf before in your examination-in-chief?

A. I think I have.

Q. That is one of the 68?

A. No; I don't think he was included in the 68 head. The 68 head was what we landed with.

156 Q. You say one of those calves that was born at Waltham was injured on the trip home?

A. Yes, sir.

Q. How?

A. Tramped on and mashed; just dwindled away when we got her home; it dwindled away; it was not diseased, only bruised on its side; it died.

Q. That is one of those you went over in your examination-in-chief?

A. No, sir.

Q. You have not mentioned that?

A. No, sir.

Mr. COSGROVE: It is not one of those five?

A. No; I did not mention that.

(By Mr. POLLARD:)

Q. All but this one arrived on the vessel; all but this calf came on the vessel?

A. Yes, sir.

Q. You say there were sucking calves?

A. Yes, sir.

Q. How many?

A. Three or four, I judge. I don't remember the exact number.

Q. They went in to make the 68?

A. Yes; those that were born before we loaded them on the boat went in to make the 68.

Q. How many were six or seven months old?

A. These three or four calves, I judge, would be considered six or seven months' calves. There were three or four calves. We
157 called them calves till they were a year old.

Q. How many were there under a year old?

A. Three or four.

Q. In that lot how many were there between one and two?

A. I don't remember the exact number; there were a good many that age. I could not say how many; some bulls.

Q. Tell about.

A. I could not say how many there were.

Q. Which section of the train were your cattle in?

A. They were in the hind section, I think.

Q. Were they by themselves in the cars or were they mixed with the Leonard cattle?

A. They were by themselves. They were in the same train, but were——

Q. Your cattle were in separate cars?

A. All to themselves—in cars to themselves.

Q. In what part of the section of the train were they?

A. The position I could not tell; the train was divided at night. We could not tell which had gone; the train was divided after dark.

Q. Were they in any of the cars that were reshipped?

A. Yes, sir.

Q. All of them?

A. No, sir; we brought two or three cars that were reshipped. I remember distinctly there were two horse cars they gave us
158 to reload cattle in. Those came to our place in Missouri.

Q. How many cars did you occupy with your cattle?

A. Five.

Q. That were loaded exclusively with your cattle?

A. With our cattle.

Q. Can't you tell what portion of the train they were in?

A. No; not exactly.

Q. If they were divided up you could not tell which section they were in?

A. Because we were behind the other train; they always called it the second section.

Q. You say the train was divided up during the night?

A. Yes, sir.
Q. That is, the night before?
A. No; divided up the night before it happened.
Q. You could not tell where your cars were?
A. I could not tell in the night quite the exact position our cars were then.
Q. You didn't know that?
A. We knew while it was all in one train—we knew about where.
Q. You could not tell then?
A. You could not tell the head or the tail when the engines went together.
Q. Before they went together, I am asking you before the collision about where in the train your cars were.
A. That is what I say I could not tell. I don't know exactly.
159 I think they were somewhere — the third or fourth car from the engine. I would not be positive of the position where they were; somewhere in the hind section.
Q. Somewhere, you cannot tell where?
A. Not exactly.
Q. Can you tell how many cars in the hind train were off the track after the collision, when you went forward to examine it?
A. I think they were all off, except two or three that were so damaged they could not go on.
Q. I am not asking you about that. I am asking you what were off the track.
A. Yes, sir; they were all off, except two or three.
Q. How many were there in the train?
A. There were 15 or 16, I think; 15, perhaps.
Q. There would be 12 off the track?
A. Yes, sir.
Q. Don't you know, Mr. Estill, that before anything was done to those cars they were hauled back by the engine?
A. They were hauled back or dragged on the track.
Q. You mean backed off the track?
A. They were dragged back; the cars were pulled back so they could get at the wreck, to work at the wreck. There were a few standing back on the ties.
Q. They were standing up?
A. Standing up, some of them; not all the cars were stand-
160 ing up. I judge from five to six were standing up, the lower train, and some of the wheels were knocked down.
Q. Of the hind train?
A. Yes, sir.
Q. How many cars do you say were broken up so they were destroyed?
A. Three; eight or nine we had to transfer.
Q. You said about three of your cars were transferred?
A. Two or three; I would not be positive of the number.
Q. Were those cars broken off in the rear train?
A. The draw-heads were broken in the end car, and another mashed in; the heads were mashed.

Q. Didn't all the cattle in the rear train remain in the cars in which they were brought there?

A. No, sir.

Q. Were they unloaded?

A. They were, I think, five or six cars that they remained in. Some were unloaded. Those cars that were the worst damaged and the cattle could not stand well in were unloaded.

Q. The cattle were taken from the cars into this lot?

A. In this lot and pasture along the railroad right away.

Q. You helped to unload them?

A. Yes, sir.

Q. And the Leonards, too?

A. Yes, sir.

161 Q. You helped to load them?

A. Yes, sir.

Q. What injuries did you discover to the cattle in unloading and loading?

A. As I say, there were four of them killed.

Q. I mean in unloading and reloading them what injuries did you discover to those cattle?

A. Soreness and stiff.

Q. That was all?

A. Yes, sir.

Q. That was all?

A. Weakness and jaded.

Q. The first animal that you say aborted after leaving Nankin you saw the——

A. Fœtus.

Q. Or calf. Did you see it first or was your attention called to it by some one?

A. I think I saw it and called the attention of my men to it. I would not be positive of that.

Q. Do you know what cow that was from?

A. No; I could tell the cow right there. I could tell her, but to tell the name of the cow I could not tell, for I was not familiar enough with the cows to say which one it was.

Q. There was a means of determining?

A. Yes, sir.

Q. You knew which individual cow it was?

A. Certainly.

Q. How could you tell it was her calf?

162 A. From the bloody appearance around her parts—from the outward signs she gave.

Q. Do you know the name of that cow? Your cattle were all named, were they not?

A. No, sir.

Q. Can't you tell which one?

A. No, sir; I hadn't been enough with the cattle to get familiar with the names.

Q. Was there any means by which you could have identified that cow and told what became of her afterwards?

A. Yes, sir.
Q. By what?
A. A number on her.
Q. Where?
A. Cut on her hip; take a pair of scissors and clip a number on the hip.
Q. What was the number?
A. I don't remember the number.
Q. A figure?
A. Yes; a figure.
Q. Could you have identified her—distinguished her in any other mode?
A. By the number and corresponding name in the herd-book catalogue. I could go through that and find the name; get the brand.
Q. By looking at that and examining the corrresponding number in the herd book you would know her name?
A. Not in the herd-book catalogue.
Q. The same book you had?
A. We didn't have the book in our possession.
Q. You were able to fix the mark?
163 A. No; not for two or three months afterwards.
Q. You were able to observe the mark on any particular cow that lost a calf?
A. Certainly we were.
Q. Did you do that?
A. No, sir.
Q. Do you know what be-ame of that cow?
A. No; I don't know what became of her.
Q. You don't know whether she turned out to be a breeder or not?
A. No; I don't know.
Q. There was no means of knowing that unless you observed that number at that time, was there?
A. No means of knowing.
Q. Preserving her identity?
A. No, sir.
Q. After the visible signs of abortion had passed off you could never tell which cow that was?
A. No, sir.
Q. If I understand you, these cattle were so near alike you could not tell them apart?
A. No, sir; we don't know one from the other except by brands or marks. Of course, when one becomes familiar with them he knows them.
Q. Unless there was some peculiarity, generally the cattle are so near alike?
WITNESS: So near alike we could not tell them.
Q. Was there something on the hoof?
A. No; we generally put a tag through the ear; we generally brand the hip.

164 Q. Yours are Aberdeen Angus?
A. All Aberdeen Angus.
Q. Distinct from the Galloways?
A. Yes, sir.
Q. Was the attention of any one called to the abortion?
A. My man with me, I told him.
Q. Who, McLachlan?
A. McLachlan.
Q. What was the age of the calf at that time?
A. I judge it was about six months old; the fœtus, I judge, was six month- old.
Q. You know nothing about the history of that cow after that?
A. No, sir; they were all turned over to my brother after that. I know nothing of the history of that cow.
Q. You never preserved her identity in order to identify her?
A. No, sir.
Q. The next one that aborted—that was somewhere between there and Chicago?
A. Chicago.
Q. How long were you running from Nankin to Chicago?
A. We were from Monday morning until Tuesday morning or Wednesday morning; we got in Wednesday evening. I wouldn't say the exact time we got to Chicago.
Q. When was it you discovered the second abortion?
A. A couple of days after that Sunday; before we got to Chicago.
Q. Do you know what cow that came from?
165 A. No, sir; I could not tell the identical cow it came from now; I could not tell what cow that came from.
Q. You knew at the time?
A. Yes, sir.
Q. By the indications?
A. Yes, sir.
Q. Was it the same in relation to that as with the other—you took no steps to preserve her identity?
A. No; I didn't take any steps.
Q. So you are not able to say now what became of that cow—whether you sold her or not?
A. No; I am not able to say.
Q. Nobody else can do it?
A. The man that was with them might be able to preserve the cows. He had been with them in quarantine.
Q. You didn't know yourself?
A. No, sir; he may have been able to tell every one's name and breed—everything.
Q. You knew nothing about them after——
A. After they arrived home?
Q. About any abortions?
A. Until the other abortions came. After the 28th of November there was a couple of abortions happened on my place.
Q. That is, after the cattle were divided?
A. Yes, sir.

Q. Between you and your brother, Mr. Elliott?
A. Yes, sir.
Q. In that division how many did you take?
A. I got half.
166 Q. They got half?
A. Yes, sir.
Q. That occurred before or after the Kansas City sale?
A. It was after the Kansas City sale.
Q. How many were sold at the Kansas City sale?
A. I am not positive as to the number.
Q. You don't remember how many you got—how many head in the division?
A. I remember tolerably well.
Q. How many did you get?
A. I think I got thirteen or fourteen cows and two or three bulls—that is, cows and calves; cows and calves the whole number of cattle I got.
Q. You mean calves with cows?
A. No, sir; as I said before, there was not but four cows brought with calves. I think I got two of them—cows with calves. The two were included in the thirteen.
Q. Two of them came over?
A. Yes; two of them were included in the thirteen.
Q. The others were heifers over a year old?
A. After taking those out. Those ten or twelve or thirteen were heifers. I could not tell the exact age.
Q. Out of thirteen or fourteen you got you say there were two abortions?
A. Two abortions after.
Q. After you got them?
A. After the 28th.
Q. You discovered those?
A. Myself.
Q. Did you see the calves?
167 A. I saw the cows lying down by the fœtus.
Q. Were there indications?
A. Yes, sir; just like she had a regular calf. Her tits were swollen—large. She was lying there as though she had a live calf.
Q. How old did you judge the calf to be?
A. I judge the calf was about five or six months old, of these two.
Q. Had you noticed that cow before—whether she appeared to be all right? Had you noticed her?
A. She looked all right.
Q. Fed right?
A. Fed right. She had her rations like she always had.
Q. Did you take any steps to identify that cow?
A. Yes, sir.
Q. How?
A. Got her at home yet.
Q. You did identify her at the time?

A. Yes, sir; I identified her. I had become familiar with her to know her.

A. You knew her?

A. Yes, sir.

Q. Can you tell what became of that cow?

A. I have her at home yet.

Q. Did she turn out a breeder?

A. She has now. She has had but one calf since 1883.

Q. She had one calf?

A. She had one calf afterwards.

Q. When did she have that calf?

A. She had that calf, I think, two years after she had this abortion.

Q. Did that cow go to the bull after the abortion?

168 A. Yes; but would abort her calf.

Q. Did she have any other abortions?

A. Yes, sir. I saw her abort two or three times. Sometimes she would pass the bull in the heat only two or three days, and a big smell—odor—came from her. We would at once know she had aborted a calf.

Q. You still keep her?

A. I keep her; am trying to make a breeder out of her. I have not quite given up.

Q. The other cow that aborted—what about her?

A. The other cow had two calves.

Q. You identified her?

A. Yes, sir; I identified her.

Q. You still have her on your place?

A. No, sir; I have not got her on my place.

Q. What did you do with her?

A. I sold her.

Q. Where?

A. Kentucky.

Q. What did you get for her?

A. I got $500 for her.

Q. It was not entirely lost for breeding purposes?

A. No, sir; after keeping her a couple of years.

Q. She got two calves after?

A. She had a calf after I sold her. She was in calf when I sold her. I sold with a guarantee that if she was not a breeder she was to be brought back.

Q. She was not brought back?

A. No, sir.

169 Q. You got your money?

A. Yes; I didn't get the money for the calf she lost on the trip.

Q. What did those cattle sell for at Kansas City?

A. I think our average on everything was $470.

Q. Do you remember how many you sold there?

A. No, sir, I don't; I don't remember the number. The Breeder's Gazette will tell you exactly.

Q. That is properly reported in the Breeder's Gazette?

A. Yes, sir; I think that is properly reported in the Breeder's Gazette.

Q. Now, the three bulls. You stated one of those went to your brother and was sold somewhere.

A. Yes; it was shipped here with a large shipment of cattle, breeding cattle, to St. Louis.

Q. The two others?

A. The two others I got.

Q. What became of them?

A. I remember disposing of them the best I could.

Q. Those, you say, were useless?

A. Useless as breeders. I don't guess they were entirely useless, because they might have got to breeding. I don't know what became of them after I sold them; I didn't give any guarantee of their being breeders. I sold them just as they were.

Q. Was it able to cover a cow?

A. No, sir.

Q. How about the other?

A. The other, it couldn't make a figure-head.

Q. Couldn't do justice?

170 A. No, sir; couldn't do justice; too long shot.

Q. What did you get for those two bulls?

A. I think I got $60 for one; I never have collected anything for the other one.

Q. What did you sell it for? What were you to get?

A. I was to get $100 for him.

Q. Please look at that (a book handed to witness). See if that is the report.

A. Yes, sir.

Q. Does that cover it all?

A. I think there were two cows taken from that sale—I won't be positive—that we put up, and they said they were aborting cows. and wouldn't sell.

Q. I don't ask that.

A. That covers the number sold.

Q. This is a correct report of that sale?

A. I think it is a correct report.

Q. Did you sell any other cattle at public sale at Kansas City?

A. No, sir; that is the only public sale we ever had.

Mr. COSGROVE: What is the date of that sale?

Mr. POLLARD: In the November 15th number Breeder's Gazette.

WITNESS: I think it was the 4th to the 9th of November; some time about the 1st of November.

Q. What was the date of the sale, do you remember?

A. No, sir; I don't; I think it was from the 5th to the

171 9th; I won't be positive; it is nearly five years ago.

Mr. POLLARD (to the court): We will offer this report of sale at the proper time. He has identified it.

Q. I understood you to say there were two abortions between Nankin and Chicago. Was that correct?

A. That is correct.

Q. And two after?

A. Three afterwards.

Q. I have asked you in reference to two of them. Please state when the other one occurred.

A. The other one occurred somewhere between Chicago and home.

Q. You don't know about that; I ask about those you personally saw.

A. I personally saw these cows had aborted calves from their appearance.

Q. You didn't see the calves?

A. No, sir; I knew they had from my experience in such matters.

Q. You say you knew from the appearance that they had aborted?

A. Three of them I knew had aborted calves, besides these two, making five in all. Two aborted before they got to Chicago; three aborted somewhere between Chicago and home.

Q. You didn't see those calves?

A. I didn't see the fœtuses; I saw the outward appearance of the cows.

Q. Did you identify those three cows?

172 A. No, sir.

Q. You don't know what became of them?

A. No, sir.

Q. How many have you got on your place of that lot?

A. Of the original lot, now?

Q. Yes.

A. I think I have got eight or nine.

Q. You either sold those or you have them on hand?

A. I don't know what became of them; I don't know whether I got them or somebody else.

Q. So far as you know, they were breeders after?

A. No, sir; I don't know they were breeders.

Q. You don't know anything to the contrary?

A. No, sir.

Q. You don't know what became of them?

A. No, sir.

(By the COURT:)

Q. Were they at the sale at Kansas City?

A. I don't know that, either.

Mr. POLLARD:

Q. You don't know their names?

A. No, sir; they were taken off the cars, put on my brother's place; he would be apt to tell you what became of them. Mr. Elliott and my brother had charge of them. I am under the impression they were not at the Kansas City sale.

Q. You don't know anything about it?
A. No, sir.
Q. How many aborted cows do you testify to all together?
A. I testified to seven.
Q. Two before you got to Chicago; three on the way——
WITNESS: And two on my place.
173 Q. And two that aborted afterwards are the only ones you can identify?
A. I can identify.
Q. Were you at home when Mr. Baldwin and Mr. Geagan and Mr. McCulloch came there?
A. Yes, sir.
Q. Did you see them?
A. I don't think I did. My brother Wallace showed them over there, I believe.
Q. Did you go around with them?
A. No, sir. I was not well, I think.
Q. The cattle were all together there?
A. No, sir; they were not all together; they were in two or three different lots.
Q. I mean they hadn't been separated?
A. Not separated.
Q. Between you and your brother?
A. They were all on my brother's farm.
Q. You say they were in different lots?
A. Yes, sir. The bulls were separate.
Q. Where were the bulls, in the stable or running out?
A. No. Running out in the pasture, I think.
Q. Running with the cows?
A. No. By themselves in a little lot or pasture.
Q. You have testified in relation to the value of aborted cows. What do you base your knowledge upon?
A. Upon my experience with aborted cows.
Q. How many do you recollect on your place or your father's place as having aborted?
A. I cannot say the exact number. From fifteen to twenty in a lifetime.
174 Q. What kind of cows were they?
A. Short-horned grade cows, or grade short-horned cows.
Q. Were they valuable animals like these?
A. No; they were not valuable stock; they were used for breeding beef. He used to breed beef steers. He bred calves, raised them to three-year-olds, and sold them.
Q. Do you recollect the history of some of these cows?
A. Some of them I do.
Q. Where any of them put on the market and sold?
A. Yes, sir.
Q. Where?
A. Of my father's breeding cows.
Q. Cows, you say, that had aborted?
A. Of those cows—short-horned cows. As soon as they made the

first or second abortion they were put in beef, to be sold, or sold to the butcher. They were not used any more as breeding cows.

Q. You know this from individual experience or just generally?

A. One or two or three, I remember, because I milked the cows as a boy up to 15 or 16 years old. I would go where they milked, too. I was raised as a farmer's boy would be—with cattle. I milked cows until I was 15 or 16 years old; had personal care of them.

Q. Do you know what was the cause of the abortions?

A. No, sir; I could not say the cause whatever.

Q. Nobody can tell?

A. I could not tell.

175 Q. Did anybody say?

A. No, sir; on the farm, no.

Q. Simply aborted?

A. Simply aborted.

Q. How long since you recollect an abortion on your farm or your father's farm before these—any abortions?

A. I recollect abortions about three or four years ago on my place.

Q. Before these cattle in controversy arrived?

A. I could not say. It was all during the whole period.

Q. Could you tell?

A. I guess——

Q. I don't want a guess.

A. I could not tell the exact time; how long it had been, I wouldn't be able to say.

Redirect.

Redirect examination by Mr. COSGROVE:

Q. Mr. Estill, I believe you stated that the whole shipment of Estill & Elliott cattle were sixty-seven or sixty-eight head.

A. Yes, sir.

Q. There was a sale in Kansas City before the division of those cattle between your brother, you, and Elliott & Estill?

A. Yes, sir.

Q. After that division you took half in number or half in value?

A. Half in value and half in number. We divided them, and then we flipped nickels as to which would take that lot or this lot—after the Kansas City sale.

Q. Do you know how many head were sold at Kansas City?

A. No, sir; I could not say the exact number.

176 Q. How long did you keep those bulls you say were injured in the wreck? One was sold for $50 or $60, the other for $100.

A. I kept one, I think, for a year and a half, the other probably two years.

Q. I understood you to state one of them was not capable of serving cows.

A. No, sir.

Q. The other?

A. The other partially by a stagger, but he was not able to give a good figure——

Mr. COSGROVE: Mr. Pollard explained his inefficiency before.

Recross (by Mr. POLLARD):

Q. How long after you got home did you discover anything the matter with those two bulls?

A. We discovered right away to a certain degree—lame, stiff, and sore; continually grew worse instead of better.

Q. You don't know the cause?

A. I thought I did; they were in this wreck; they were well before they — put in the cars.

Q. Was there any external injury?

A. No, sir; no external injury except with the bull, whose testicles were swollen. I don't know whether you would call that external or internal; his testicles were swollen.

Mr. COSGROVE: I want to ask one question as to the general appearance of these cattle. What was their general appearance; did they resemble each other in color?

177 A. They resembled each other very much in color, in size, in uniformity; that was the great characteristic of the breed. They were uniform in color and size.

Testimony of Jno. McLachlan.

JOHN MCLACHLAN, sworn on behalf of the plaintiffs, testified as follows:

Direct examination by JOHN COSGROVE, Esq.:

Q. Mr. McLachlan, where do you reside now?

A. I reside at Estill.

Q. Where were you born, Mr. McLachlan?

A. I was born in Scotland, the north of Scotland.

Q. How long did you reside there?

A. For twenty years.

Q. What was your vocation in Scotland?

A. I was raised on a farm principally.

Q. How far did you live from the vicinity, in Scotland, where these cattle—black cattle—are raised?

A. I was raised right amongst them.

Q. Brought up with black cattle?

A. Don't understand I mean in the barn.

Q. Of course we understand that. You were in the vicinity of where the black cattle were?

A. I was raised within ten miles of the premium herd, Sir George McPherson Grant's.

Q. When did you leave Scotland?

A. In the spring of 1882.

Q. Where did you come?

A. I came to Quebec with a shipment of cattle.

Q. Whose cattle were they?

A. They belonged to Mr. Whitfield, in Canada.
Q. Where did you go from there?
—. Came to Chicago, with a sale he had in Chicago.
Q. How long did you remain there?
178 A. Stayed there till the cattle were sold. From there I came to Estill.
Q. Estill, Howard county, Missouri?
A. Yes, sir.
Q. How long did you remain there?
A. For two years.
Q. That would be 1884?
A. Yes; I left in 1884.
Q. What do you know about these cattle? When did you first see the cattle of Estill and Elliott and the Leonard brothers, if at all?
A. I went with Wallace Estill to Waltham to meet them, to feed and take care of them there at quarantine.
Q. Do you recollect when you arrived there?
A. I arrived there, I think, the 17th of July, 1883.
Q. Were the cattle there when you got there?
A. Yes, sir. The cattle were there three days, I believe, before I got there.
Q. What was the condition, so far as you were able to observe, of those cattle?
A. Well, the general appearance of the cattle was good. The stabling was insufficient for the cattle. I didn't see them herding at all.
Q. How long did you remain at Waltham?
A. They were there between two and three weeks, I believe.
Q. What was your relation or duty there towards these cattle?
A. To feed and take care of them, Estill and Elliott's cattle.
Q. How often did you see them?
179 A. I was with them all the time—all day, from morning till night.
Q. State whether there were any abortions there.
A. No, sir; none; no abortions.
Q. Where were they taken from there?
A. To Concord.
Q. About how far is that?
A. Ten or twelve miles.
Q. How were they taken to Concord?
A. Part were driven; part of the heavier bulls were shipped by cars.
Q. How long did they remain at Concord?
A. About five or six weeks.
Q. What was your relation to those cattle during their stay at Concord?
A. Still to feed them and take care of them.
Q. State to the jury how often you saw them.
A. They were fed three times a day. I had charge of preparing

the feed. I was with the cattle all the time. I had sixty-eight head of Estill and Elliott's.

Q. How were the cattle kept there? How were they divided, if at all?

A. They were divided into four different lots. There were two barns. The best of the bulls were put in the barns. Some young bulls—twenty to thirty young bulls—were fed in the open pasture. The rest were heifers—three lots of heifers. Our heifers were separate from the Leonard heifers—that is, the Estill and Elliott heifers were separate from the Leonards'.

180 Q. Do you know anything about the Paris green?

A. Yes, sir.

Q. Where was that; what field?

A. I don't remember the direction; whether it was north or south. Those were the Leonard cows. The Estill and Elliott cattle couldn't go within a quarter of a mile of where the Paris green was found.

Q. Did any of the cattle of Estill and Elliott or the Leonard cattle abort or drop their calves at Concord, to your knowledge?

A. No, sir; not to my knowledge.

Q. How often did you see the Leonard cattle?

A. I saw the Leonard cattle every day. I was — where I saw them.

Q. Did you see those that were sick?

A. Yes, sir; I was attending to them.

Q. How many were there?

—. I think there were about thirty head that were drenched for an antidote.

Q. Drenched on the supposition they had taken it?

A. Yes, sir; we were not positive they did; they appeared to be a little drooping.

Q. How long were the thirty head kept up or drenched?

A. The only ones drenched were on Sunday afternoon. They were turned out, except two or three, on Tuesday morning.

Q. Those cattle that were turned out—all *all* but three—the twenty-seven head turned out—how did they seemingly get

181 on after that?

A. They got on, apparently, all right.

Q. The two or three head that were kept up for further treatment—state to the jury how they got along.

A. There was one of them that was rather dilapidated for five or six days. After that it got along all right. The rest all recovered rapidly.

Q. How many died, if you know?

A. There were five died—three cows and two calves or three heifers and two calves.

Q. How old were those heifers—the three that died?

A. Between eighteen months and three years old.

Q. How long was it before they were taken from Concord to Missouri?

A. About three weeks.

Q. You say there were two calves that died also?

A. Two heifer calves.
Q. How old were they?
A. From six to eight months old.
Q. The other three were from eighteen months to three years?
A. Yes, sir.
Q. Did any of those cows in the Leonard herd that took that abort?
A. No, sir; not that I know of.
Q. When did you ship them from Concord to the West?
A. They shipped them on the 13th or 14th of September.
Q. What was the condition of those cattle at the time they were shipped?
A. They were in perfect health to all outward appearance.
Q. Did you know the railroad officials?
182 A. No, sir; I was not personally acquainted with them. I saw some gentlemen. I didn't know whether they were railroad men or not.
Q. How were the cattle loaded on the train—how were the cars fixed?
A. The cars were ordinary stock cars, with a division at each side, running across the car, on each side of the door, of three scantlings, two by six, to keep the cattle off the feed. The feed and water was in the space between the two doors. The division between was for the feed and water.
Q. What was the condition of the Estill and Elliott stock, which you know of particularly, when they left Concord?
A. They were in perfectly healthy, rugged condition.
Q. The Leonard cattle—as far as you know, how were they?
A. They were all apparently all right.
Q. Who accompanied the train West? Did you go with it?
A. Yes, sir; I was with the train. Mr. Will. Estill, John Cunningham, and three or four other Scotchmen who came across with the cattle—four, I believe.
Q. What attention, if any, did you show to the cattle while they were en route from Concord to Nankin, Ohio, or Kent, the end of the division?
A. I fed the five cars of cattle that belonged to Estill and Elliott.
Q. How often did you go into the cars, or did you go in at all?
183 A. I was in the cars most of the day feeding them and watering them. They were fed three times a day and watered.
Q. Had any of those cows aborted or shown any signs of abortion prior to the accident?
A. No; they had not.
Q. About what time did the accident occur?
A. It occurred about four o'clock on Sunday morning.
Q. Whereabouts?
A. On the siding, at Nankin, Ohio, on the side track.
Q. On which train or section of that train were you?
A. I was on the rear section.

Q. Where were the Estill & Elliott cattle?
A. In the rear section of the train.
Q. Some of the Leonard cattle, too?
A. Yes, sir.
Q. And the balance in?
A. In the front of the train.
Q. Do you know how many cars of cattle of Estill and Elliott there were, about; how many were there in both sections?
A. There were five cars of Estill and Elliott all together.
Q. Do you know how many there were of Leonards'?
A. Twenty-five cars; thirty loads of cattle all together.
Q. You say the accident happened about four o'clock in the morning. You may describe to the jury how you first heard or learned of it and what you learned.
A. Well, I was asleep when the accident happened. The jar woke me up.
184 Q. What effect did it have on you?
A. It jarred me up, of course.
Q. How much of a jar?
A. A pretty hard jar. I woke up, saw a man fall down in the caboose, the stove turned over; everything in the caboose was turned over.
Q. What did you do?
A. We got out. The first thing we did was, I went down to see the men were safe in the front end of the train; I knew they were there in the caboose. We then made every effort to get the cattle out of the cars.
Q. How many of the cars were broken or injured, if you can tell?
A. There were three entirely demolished; six more were——
Q. In which division were those six that were entirely demolished?
A. Two in the front section and one in the rear section were entirely demolished.
Q. How many others were broken?
A. There were six more so badly injured they couldn't go forward.
Q. What became of the three cars you say were demolished?
A. If I recollect rightly, they were burned right there.
Q. Burned by whom?
A. By the railroad men.
Q. The other six cars. Did they go on or remain there?
A. They remained there. I don't know what was done with them. They were there when I left.
185 Q. What became of the cattle in the six cars?
—. Some were taken out; others put in the pasture; others stayed most of the day in the cars. I don't know how many cars were unloaded.
Q. What eventually became of the stock? Did you transfer them to other cars?
A. The cars that were burned, the cattle were taken out, the bulls

were tied to the fence, the heifers were turned in the pasture—grass pasture—but there was no water in it; towards the afternoon we drove them across the roads right there, round to a small pool, where it was said a few of them could get water, but so many came it stirred it up—raised the mud. It was a very small pool; not wide at all; a small rivulet running across.

Q. Do you know how many cattle were killed?

A. There were four killed.

Q. Whose were they?

A. The Messrs. Leonards'; none of the Estills'.

Q. What kind of cattle?

A. Galloway calves and heifers.

Q. Four heifers?

A. Four heifers.

Q. Were there any others injured?

A. I think we left two bull heifers so badly injured that we left them.

Q. You say there were two bulls. Do you know what the names of the bulls were?

A. No, sir.

Q. How long did you remain there, then?

A. We were there till Monday morning about seven o'clock, I think.

186 Q. What was the condition of the cars when you got up?

A. In most all the cars all these partitions to hold feed were broken down. I don't mean all of them, but most of them in nearly all the cars. There may have been two or three partitions that were not broken down. With the exception of two or three they were broken down. The others were so entirely destroyed we couldn't feed with them. The cattle in the three cars in front of the caboose in the front of the train were thrown out on the track. One car was turned over on its side and the bulls were tied by the ring-nose; they were hung by the nose; some, the legs were fastened in the cars; two or three were down under the cars. Two or three cars just behind, in the rear of the train, were generally demolished and the cattle in a generally demoralized state.

Q. What time did you leave Nankin—about what day and what hour of the day, as near as you can tell?

A. Monday morning; between seven and eight o'clock in the morning.

Q. The following Monday morning?

A. Yes; we expected to leave Sunday morning about four o'clock.

Q. What did you do; did you accompany the cattle?

A. Yes, sir; I was with the cattle going to Chicago; the same as I had been before.

187 Q. Did you discover anything while on the way?

A. On Monday afternoon, about four or five o'clock, one of the cows aborted.

Q. Are you able to tell the name of that cow?

A. I don't know. I did at the time. I don't remember the name. I knew all the cows—the numbers and their names. I had

a note of it in my book when I left the firm. I delivered that book over to my brother.

Q. Your brother succeeded you as herdsman?

A. Yes, sir.

Q. When, if at all, did you discover anything else in reference to any loss of that sort?

A. There was another one next day some time. I don't remember the time.

Q. Before you reached Chicago or after?

A. Yes, sir; before we reached Chicago.

Q. How long did you remain at Chicago?

A. Two or three hours. I don't remember exactly. I think we stayed there a short time.

Q. When you left how did you go from Chicago to Estill?

A. On the Wabash to Moberly and from there——

Mr. COSGROVE: Did you not accompany the stock?

A. Yes, sir.

Q. From there to Estill?

A. Yes, sir.

Q. Did you discover anything else of the kind?

A. Yes, sir. There were three more abortions before we arrived at Estill.

Q. State when you reached Estill.

188 A. We arrived there at 6 o'clock.

Q. What relation did you sustain to these while there?

A. I was six months herdsman there.

Q. How many, if any, aborted after that?

A. I said I was there six months. I was there eighteen months afterwards.

Q. On whose place did you stay?

A. At Mr. Wallace's place.

Q. How long were those cattle kept together?

A. They were kept together until some time in the latter end of October, when some were sent to Kansas City to be sold.

Q. How many abortions occurred in that herd before they were separated?

(By the COURT:)

Q. After they got home?

Mr. COSGROVE: Yes.

WITNESS: Four or five. I would not positively say which.

The COURT: Before you sent them to Kansas City?

WITNESS: Yes, sir.

Mr. COSGROVE: Before they were sent to Kansas City? Four or five in addition to the five——

WITNESS: In addition to the five that aborted on the cars.

Q. Can you state about the time they were sent to Kansas City?

A. They started about the 27th of October.

Q. Do you know how many were sold at Kansas City?

A. Twenty-seven head.

189 Q. Twenty-seven head sold at Kansas City. How many, if you know, aborted after they came back?

A. Two cows.

Q. Two more cows after they came back. On whose place was that?

A. Mr. Wallace's.

Q. You say two more aborted after they came back to Mr. Wallace Estill's place. Was that before or after the division between William and Wallace?

A. I don't remember as to that, whether it was before or afterwards.

Q. How long after you got back from Kansas City was it before those two abortions occurred?

A. One, I think, was about three weeks; the other was about six.

Q. Now, do you know of any other ones aside from those cows to which you have made allusion that were injured in that collision?

A. Yes, sir; there was one calf.

Q. Which calf was that?

A. Out of the cow Miss Walker; considered very valuable.

Q. A calf?

A. A calf; yes.

Q. Is that a calf that was given birth to at Waltham by Miss Walker?

A. Out of Miss Walker; born at Waltham; calved at Waltham; Miss Walker the 5th.

Q. That calf is dead?

A. Yes; she died about six weeks or two months after; I don't know exactly the date.

The COURT (to Mr. Cosgrove): Do you make any claim on account of that calf?

190 Mr. COSGROVE: No, we are not making any. I am just asking for information if that is the calf.

Q. That was trampled on?

A. Yes, sir.

Q. Any others?

A. Yes, sir; three bulls were badly injured.

Q. Tell what you know about that.

A. There was one of them that appeared to be—I don't know what was the matter with him; he appeared to be stove up generally; lame in all the legs; appeared to be hurt in the back; he was hurt in the testicles.

Q. Do you know whether those three bulls were able to serve during the next eighteen months after you were there?

A. No, sir; they were not.

Q. Did you ever see them attempt it?

A. No, sir; never saw them attempt it.

Q. Did they have opportunity if they wanted?

A. No, sir; I don't think they had; there was one of them had; the others never tried while I was there.

Q. Were you acquainted with the value of the cattle at that time?

A. Nothing, only from reading; never bought or sold any in my life.

Q. Mr. McLachlan, do you know a cow called the Empress of Newton?

A. Yes, sir.

Q. What do you know about her?

A. She aborted her calf in transit from Chicago to Estill.

Q. That is one of the three that aborted?

191 A. Yes. sir; she was crippled in one of her feet.

Q. Were there any of the other animals that had any physical injury besides the three bulls, and this cow called the Empress of Newton, leaving out of consideration that calf?

A. No, sir; not any very serious injury. They all appeared to be very stiff from the jam for some considerable time.

(By the COURT:)

Q. What has become of the Empress of Newton?

A. I think she is in Mr. Elliott's farm now.

(By the COURT:)

Q. That is the one he spoke about?

A. Yes, sir.

(By Mr. COSGROVE:)

Q. That is Mr. Elliott or Mr. Estill?

A. Mr. Elliott, I believe; that was the last I saw of her.

Mr. COSGROVE: Mr. Estill was the gentleman that testified.

Cross-Ex.

Cross-examination by GARLAND POLLARD, Esqr., for defendant:

Q. This Empress of Newton you say is one of the three that aborted between Chicago and Estill?

A. Yes, sir.

Q. How do you happen to know her?

A. I knew all the cattle. I knew all the names. I had a book with the numbers and names on it. I personally remembered all the cattle in quarantine.

Q. Could you recollect without examining the numbers and comparing them with the numbers in the book?

192 A. Yes; I could tell they were on the book, so familiar with the names.

Q. Had you become so familiar you could tell?

A. Yes, sir.

Q. Did you know the names of the cattle?

A. Yes, sir.

Q. Did you have a catalogue?

A. No, sir. I had a book with the names and pedigree.
Q. And the numbers?
A. Yes, sir; the numbers.
Q. And you so examined the number on this Empress of Newton?
A. No, sir; I didn't then. I knew the cow personally.
Q. How did you know her?
A. Because I knew all of them. I was nearly three months in quarantine.
Q. You knew each one personally, did you?
A. Yes; I mean I knew them all.
Q. What became of the Empress of Newton? You think she is still on Mr. Elliott's farm?
A. I believe she is. She was the last I saw of her—three months ago.
Q. She turned out to be a good cow?
A. I don't know whether she has bred or not. She was lame the last I saw of her. She was crushed in the hind foot. I don't know whether any bones were broken. She was the lamest of the three.
Q. She was lame when she came off the car?
A. Yes.
Q. Remained lame?
A. Yes, sir.
Q. Would that lameness injure her for breeding purposes?
193 A. No; not if a regular breeder. It would for sale.
Q. Do you know whether she did breed?
A. I don't know. She never did while I had charge of her.
Q. How long was that?
A. For eighteen months after the wreck.
Q. How many aborted, do you say, between Chicago and Estill?
A. Three between Chicago and Estill.
Q. What were their names?
A. I don't remember but one. One was Lady Teazle.
Q. Why don't you remember the other?
A. Because I have forgotten her name. I did know at the time. I disremember it.
Q. You do remember Lady Teazle?
A. Yes, sir.
Q. Do you know who got her in the division?
A. Estill and Elliott got her in the division.
Q. Do you know what became of her?
A. She had no calf before I left, but I believe she was in calf. She had a calf afterwards, I believe. I am not positive as to that.
Q. Did she remain on your place?
A. I think she is on Mr. Elliott's place now.
Q. You say there were three that aborted between Chicago. One was Lady Teazle, one was the Empress of Newton—who was the other?
A. I don't remember the name.
Q. Do you know what became of her?
A. No, sir; I don't remember.

Q. You say there were two or three aborted before they reached Chicago?
A. Two.
Q. What were their names?
194 A. One was Heatherbell of Farmton.
Q. Those are the same William Estill testified to?
A. I presume they are. I pointed them out to him.
Q. There were but two?
A. There were two; yes, sir.
Q. They were Lady Teazle—what was the other?
A. Heatherbell of Farmton; before they reached their destination.
Q. Heatherbell? When did she abort?
A. Between Nankin and Chicago.
Q. The other one of the three between Chicago and Estill you don't know?
A. I don't remember the name.
Q. Do you remember the name of the other one that aborted before they reached Chicago?
A. No, sir; I don't remember.
Q. I understand you to say you don't know what became of Heatherbell of Farmton?
A. Yes, sir; she was sold at Kansas City.
Q. Do you know what she brought?
A. I don't remember what she did bring. I presume the Gazette will tell you.
Q. Those, the names of which you cannot remember, you know nothing about?
A. No, sir; I don't know what became of them.
Q. How many cattle did the Estills and Elliott take to Kansas City?
A. They took thirty head.
Q. And sold twenty-seven?
A. Sold twenty-seven.
Q. What did they do with the other three?
195 A. They were brought back home.
Q. What were they—bulls or heifers?
A. One bull and two heifers.
Q. Were you at the Kansas City sale?
A. Yes, sir.
Q. Do you know why those three were not sold there?
A. No, sir; I don't know. The heifers, I believe, couldn't be guaranteed in calf.
Q. I don't ask you what you believe; if you know anything about it.
A. All right.
Q. Did they guarantee all they did sell?
A. Yes, sir.
Q. The bull wasn't brought back on that ground?
A. No, sir; I guess not. I don't know what the ground was.

Q. Now, in relation to these bulls. You say that they couldn't serve very well. Did you ever see them attempt to serve cows?

A. I never saw them attempt. I saw one turned out with a cow. He never attempted to.

Q. Do you know whether the cow was in condition?

A. Yes; I know she was. I turned another bull out and had her served.

Q. The other bull was the best. Did this bull try to serve her?

A. No, sir.

Q. Was that the only time you ever tried her?

A. That is the only time I ever tried.

Q. Was he kept up in the stable—kept away from the cows?

196 A. No; they were in the stable alone.

Q. The two bulls?

A. Away from the cows.

Q. This one I am talking about?

A. He was kept in the stable; turned out for exercise.

Q. He was kept from the cows all the time?

A. Yes, sir.

Q. Never was taken to serve cows unless taken for that purpose?

A. No, sir.

Q. This one is the only time you ever knew of his being brought out?

A. Yes, sir.

Q. That is the only reason you have for saying he couldn't serve cows?

A. That is my reason.

Q. Which one of the bulls was that?

A. Strathnaver, I believe, was the name.

Q. How long did they keep him?

A. They had him when I left there.

Q. Do you know whether he is there now or not?

A. He isn't there now.

Q. Do you know whether they ever tried him?

A. I don't know.

Q. With that exception, was he apparently right?

A. No, sir; you could see he was damaged in his back; had scars in his hind parts. He could not walk about very well.

Q. What were they keeping him for?

A. I don't know.

Q. How long after the wreck did they keep him, to your knowledge?

A. For eighteen months.

197 Q. What is your own knowledge in relation to the other bull?

A. When the cattle were divided up they both went to William Estill's farm, and I knew no more of them.

Q. After that you knew nothing?

A. I knew nothing about them.

Q. What did you know of him before that?

A. I knew he was stiff.

Q. Was he able to serve a cow?
A. I never saw him tried.
Q. So you don't know anything about it?
A. No, sir.
Q. Those, then, are the only bulls in the whole lot you considered disabled?
A. They are the only bulls.
Q. Included in the whole of Estill and Elliott's cattle?
A. Yes, sir; there were three.
Q. What was the other one?
A. One was stiff all over; he was crippled on all his legs; two were badly disabled in the back. .I believe that is my former testimony.
Q. Was the one that was stiff all over able to serve cows?
A. I never saw him tried.
Q. You don't know whether he was or not?
A. No, sir; I don't know; I would hate to buy him on that understanding.
Q. Couldn't he walk about?
A. Very stiffly; if turned out to the pasture he couldn't keep up with the cows.
Q. You mean he couldn't take a cow that was alone?
A. I mean he couldn't get over the pasture; could not follow them, because when he was turned out in the lot he never went far from one corner of it while I had charge of him.
198
Q. Didn't he go down to feed?
A. Very little.
Q. He did some?
A. Yes, sir; a little, certainly.
Q. Was he turned in with the other cows?
A. He was never turned in with them.
Q. How do you know he couldn't catch one?
A. I say I didn't think so.
Q. What is your reason for thinking so?
A. Because he didn't get around in his own lot.
Q. You never saw him with the cows?
A. No, sir.
Q. You never saw him attempt to serve a cow or catch one?
A. No; he never had a chance while I saw him.
Q. You never brought a cow to him? Who got him in the division?
A. Mr. William Estill.
Q. You were in charge of Estill & Elliott's cattle; you had nothing to do with the Leonard cattle?
A. No, sir.
Q. Whatever observations you made of those were casual?
A. Yes, sir.
Q. You were with the Estill and Elliott cattle from the time they were taken from Concord, and whilst they were at Waltham, until they arrived in Missouri?
A. Yes, sir.

Q. Do you mean they were always kept separate from the Leonard cattle?

A. Yes, sir.

Q. Before they arrived in Missouri?

199 A. Yes; with the exception of a few bulls they were.

Q. Were they all kept separate at Waltham?

A. No, sir; not at Waltham.

Q. They were all together at Waltham?

A. They were together at Waltham.

Q. The Estill and Leonard cattle?

A. Yes, sir.

Q. Were they not driven over to Concord together?

A. Yes, sir; they were driven to Concord.

Q. They were driven over to Concord?

A. Yes.

Q. Except a few bulls which were kept up?

A. Yes, sir.

Q. All the bulls were kept away from the cows?

A. Yes, sir.

Q. When you got to Concord they were put on the farm?

A. Yes, sir.

Q. Were the Leonard cattle put up by themselves there?

A. Yes, sir.

Q. And none of the Estill cattle with them?

A. Yes, sir; with the exception of a few young bulls that ran with the Leonard bulls.

Q. Sir?

A. There were a few young bulls of Estill and Elliott's that ran with the Leonard bulls. The heifers and cows were all separate.

Q. They were on the same farm?

A. On the same farm.

Q. How large a farm?

A. I could not say; three or four hundred acres.

Q. How separate were the Estill and Elliott cattle from the

200 Leonard cattle while at Concord?

A. There was a ditch; then a timber fence was built along the edge of the ditch.

Q. On both sides?

A. On one side.

Q. Did they both go to the same stream of water?

A. Yes, sir; of course at different parts of the stream.

Q. Did those cattle never break out—get together?

A. I believe two or three of the cows of ours got over together with the Leonard cattle. That was before the fence was built. We depended on the ditch to keep them apart.

Q. The ditch didn't keep them apart?

A. It did not, and we built a fence.

Q. Before the fence was built the cattle were known to cross the ditch?

A. They did once, I say.

Q. May they not have more than once?

A. Once I know of; I would know if there were any other times.
Q. How?
A. Because I would have to separate them to feed.
Q. How?
A. I saw my cattle every time they were fed.
Q. Did you see them at night?
A. If they went at night I would have to get them in the morning.
Q. They were never known to go across at night?
A. No, sir; except the time they did cross the ditch; when they crossed the ditch there was a fence put up.
201 Q. The fence you built for that purpose?
A. Yes, sir.
Q. How long was that after you got them to Concord?
A. I guess we were three ten days before the fence was built. I don't say positively.
Q. How were the cattle fed at Waltham and Concord; did they have anything but grass?
A. Yes, sir; they were fed grain.
Q. What?
A. Bran and corn-meal.
Q. How often?
A. Three times a day; some of them were fed three times a day, some were twice.
Q. How much of a feed?
A. We fed then what we thought they would eat and relish.
Q. How much did you think they would eat and relish?
A. I never weighed it.
Q. Can you tell anything about it?
A. No, sir.
Q. You just gave them all they would eat, didn't you?
A. No, sir.
Q. You say they got what they would eat and relish?
A. Yes, sir.
Q. What do you mean?
A. I mean they cleaned up everything every time they were fed—a couple of times a day.
Q. You intended to give them all they would eat?
A. Yes, sir; all they would clean up.
Q. All they would eat?
A. Yes, sir; all they would eat and relish.
Q. How did you know when they didn't relish it?
A. I don't think they will eat it.
Q. Substantially, you gave them all they would eat?
A. Yes, sir; that was the intention. I don't know whether I did or not.
202 Q. Did you feed them anything except bran and corn-meal?
A. Some bulls were fed corn and oats.
Q. Not the heifers or cows?
A. No, sir.

Q. Were not some fed linseed meal?
A. No, sir; not a single cow of the Estill and Elliot bunch were feed linseed meal.
Q. You are speaking of the Estill and Elliott cattle?
A. Yes, sir.
Q. Were they fed anything except bran and corn-meal, and some oats to the bulls?
A. They were fed hay after the grass was short.
Q. It was somewhat played out at Concord?
A. Yes, sir.
Q. Where did they have grass?
A. At Concord they had grass, at Waltham they had none.
Q. What was the character of the feed when they got home to Estill?
A. They were fed; some of them that were intended for sale were put in the barn, same as they had been fed.
Q. What does that mean?
A. Fed corn-meal and bran.
Q. You were preparing them for sale?
A. Yes, sir.
Q. Did any of those you took up to prepare for sale abort?
A. There was one cow aborted in the barn.
Q. Which one was that?
A. I don't remember the name.
203 Q. Did you pick out the best of the cattle to prepare for that sale?
A. No, sir; not the best; we didn't consider them the best cattle; they were in the best condition for sale.
Q. You were feeding them for that purpose?
A. Yes, sir.
Q. You have mentioned a cow that aborted before?
A. Yes, sir.
Q. Which one was that?
A. I don't remember her name.
Q. Did she go to Kansas City?
A. No, sir.
Q. But one that did abort did go there?
A. She was served; thought to be in calf; didn't prove it.
Q. Was she served before she went to Kansas City?
A. Yes, sir.
Q. Sold as with calf?
A. Yes, sir; as considered that way.
Q. She never came back?
A. Yes, sir; she came back.
Q. I understood you to say she didn't come back.
A. No; I say she was served; she came back to us.
Q. Which one was that?
A. Heatherbell of Farmton.
Q. What became of her?
A. I don't know where she is now.
Q. Came back to the place when you were there?

A. She came back to be served. A neighbor of ours bought her. She came back to be served. I think she had a calf about two years afterwards.

204 Q. Then the purchaser took her again?

A. Yes, sir.

Q. Do you know of her being served then?

A. Yes; if he could get her with calf he would keep her.

Q. She never was returned to Estill?

A. No, sir.

Q. She went under the sale?

A. Yes, sir; of course, they guaranteed her breeding.

Mr. POLLARD: I am not asking that. I am asking about facts. You have stated that two or three times they guaranteed her.

(By the COURT:)

Q. Was that one of the seven you mentioned?

A. Yes; I mentioned her name before.

Q. Was she one that aborted between Nankin and Chicago—is that one?

A. I am mistaken. It is not Heatherbell of Farmton, but another cow of Farmton. It was Heatherbell aborted between Nankin, Ohio, and Chicago. Melina of Farmton is the name of the one I have reference to that aborted in the barn.

(By Mr. COSGROVE:)

Q. Where is she?

A. She is in Mr. Will. Estill's place now.

(By Mr. POLLARD:)

Q. You took her out and replaced her with another?

A. Yes, sir; we took her out of the stable and replaced her with another one.

Q. Do you know what became of her?

A. This cow that aborted in the barn?

Q. Yes.

A. I say she is on Will. Estill's place now. I don't have

205 charge of her now.

(By the COURT:)

Q. She was one of the four or five you mentioned as having aborted after you got them home and before you took them to Kansas City?

A. Yes, sir.

Redirect.

Redirect examination by Mr. COSGROVE, for plaintiffs:

Q. How long after the cattle reached Concord was it before the fence was put up along the line of that ditch?

A. I think it was about ten days. I am not positive; it may not have been a week.

Q. Was that before or after the discovery of the Paris green?
A. It was before.
Q. Before that?
A. Yes, sir.
Q. You say the cattle in the different pastures drank at the same stream?
A. Yes, but at different parts of the stream.
Q. The stream wound through different fields?
A. Yes, sir.
Q. They drank at the same stream, but in different fields—different parts?
A. Different parts of the stream.
Q. Which way did the stream run—towards the Leonard cattle or towards the Estill cattle?
A. I don't remember that.
Q. Was it a running stream?
A. It was running very little; still the water was moving. I don't remember which way it run.

Q. Mr. Pollard asked you about the Heatherbell of Farm-
206 ton. Is she not the cow that was sold to Mr. Kingsbury?
A. Yes.

Q. How long after she was sold was it before she proved to be a breeder; or, at least, how long was it after she had a calf before she proved to be a breeder—before she had another calf after she dropped her calf?
A. She was about a year before she got in calf.
Q. Before she got in calf?
A. Yes, sir.
Q. So, before she had another calf was about two years. Do you know, as a matter of fact, how many calves that cow had?
A. She never had but one.

(By Mr. POLLARD:)

Q. Do you know what she sold for at Kansas City?
A. I don't remember.
Q. You said she never had but one calf after that. Do you know of your own knowledge or did some one tell you that?
A. That is what I was told.
Q. You don't know?
A. Not personally.
Q. Except she came back to breed?
A. Mr. Kingsbury told me she never had but one calf.

Hugh W. Elliott.

HUGH W. ELLIOTT, sworn on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. COSGROVE:

Q. Where do you reside?
A. Howard county.

Q. You are one of the plaintiffs with Wallace Estill and others against the defendant here?

A. Yes, sir.

Q. What is your business?

207 A. I am a farmer and stock-dealer.

Q. How long have you been engaged in business?

A. Well, I cannot say exactly; quite awhile.

Q. I didn't ask you your age. You are a single man?

A. I have been engaged in it ever since I was big enough to engage in anything; all my life.

Q. What kind of cattle have you handled during that time?

A. I have been handling grade cattle, thoroughbred cattle, short-horns.

Q. What do you mean by grade cattle?

A. We first started out with heavy-grade short-horn cattle—that is, our native cows crossed with our short-horn bulls. Since that I have been handling a deal of thoroughbred cattle; I have had some thoroughbred cattle I bought in different places and sold it to men in Kansas; been selling Angus cattle; I have been selling them, I suppose, for five or six years, or seven years.

Q. Did you go to Scotland in 1883?

A. Yes, sir.

Q. For what purpose?

A. Went there to import some Angus cattle.

Q. Were your cattle all Angus or part Galloway?

A. They were all Aberdeen-Angus cattle we call them.

Q. You say you went to Scotland in 1883 for the purpose of buying cattle—what kind of cattle?

A. Aberdeen-Angus cattle, black cattle.

208 Q. Where is the place of nativity of these cattle?

A. Aberdeenshire and Forfarshire.

Q. In Scotland?

A. Yes, sir; north of Scotland.

Q. What were those cattle intended for?

A. They were intended for beef more than anything else—beef and milk.

Q. These particular ones you bought?

A. They are intended more for beef cattle than any other class of cattle.

Q. You don't understand me. Did you buy that class of cattle for the purpose of making beef of them, or for some other purpose?

A. I bought them for breeding cattle and improving our native stock and sale.

Q. How many head did you buy?

A. 67.

Q. Who were interested with you?

A. Will. and Wallace Estill.

Q. What did you do with those cattle?

A. We sold part of them.

Q. What did you do with them when you bought them; come from Scotland over here?

A. We bought them in those different counties of Scotland, and we bought a few over in England that had come down there.

Q. You shipped them to this country?

A. We shipped them to this country.

Q. Did you accompany them?

A. Yes, sir.

Q. State what kind of a voyage you had.

A. We had a very pleasant voyage, I considered.

209 Q. How did your cattle look and act—appear—when they landed in Boston?

A. They looked in very good shape; nothing the matter with them I could see.

Q. Had any ac ident happened or abortion or any died or anything en route?

A. No, sir.

Q. They landed at Boston; then where did they go?

A. They went from Boston to Waltham, quarantine station near Waltham.

Q. Did you remain with them or come home?

A. I remained with them till they were removed from there to Concord.

Q. Were you there when they were removed yourself?

A. Yes, sir.

Q. During the removal?

A. I helped.

Q. Did any of your cattle or any of the Leonard cattle die in transit from Boston to Waltham?

A. Yes, sir.

Q. Whose?

A. Leonard cattle; I think about two of them—two or three of them—I forget now which.

Q. They died?

A. Yes, sir.

Q. Did any others of yours die?

A. No, sir; none of ours died.

Q. About how long did you remain at Waltham?

A. I forget; I think about two or three weeks.

Q. Then where did you go?

A. They went up to Concord.

Q. How did you move your cattle there?

A. Nearly all by land.

210 Q. By road, you mean?

A. By road, by driving; the others went by railroad.

Q. Were any of yours sent by railroad?

A. I think we had some go; we had the heavier part of the bulls.

Q. The cows you didn't want to walk?

A. Didn't want to walk.

Q. How long did you remain at Concord?

A. I remained till the cattle were all in good shape before I left.

Q. What was the general appearance and general condition of those cattle when they reached Concord?

A. They were in very good shape.

Q. Had there been any abortions, to your knowledge, at the time you left?

A. No, sir.

Q. Any sign of any?

A. None that I knew of.

Q. How often did you see them during the time you were there at Waltham?

A. While at Waltham I saw them every day—twice a day. I was with them nearly all the time at Waltham, and at Concord I only saw them about once a day; I was up there once in the morning and came back in the evening; still boarded at Waltham.

Q. You left there then for Missouri?

A. Yes, sir.

Q. When did you see them again?

A. I didn't see them till after they had landed there; I
211 suppose about ten days; something like that.

Q. You were not present when the cattle came off the cars at Estill?

A. No, I was sick in bed.

Q. Not able to get there?

A. Yes, sir.

Q. Then you saw them about ten days after that?

A. Yes, sir.

Q. Where were they?

A. At Estill's farm, Wallace Estill.

Q. Had they been divided at that time?

A. No.

Q. What was the condition of the cattle then?

A. I considered them pretty bad condition.

Q. Just describe to the jury their appearance, general appearance.

A. I didn't make any minute examination of them, for I was not well at the time I went over there; I was riding around in a buggy at the time. They had some up in barns, different places. Those I did see I thought looked badly.

Q. Do you know anything, of your own knowledge, of any of these cows having aborted?

A. No, sir; I do not.

Q. Do you know anything about those bulls spoken of?

A. The bulls spoken of, I don't know nothing of the injuries in the wreck or anything of the kind. I know they were in good shape when I left them and the next time I saw them they were in bad shape, some of them broken down.

212 Q. State what was the condition the first time you examined them on that occasion or after that.

A. One of the bulls was weak in the loins and wabbled when moving around.

Q. How many were there of the cattle so affected?

A. I think three, as I recollect it.

Q. What would those bulls, in your judgment, have been worth had they arrived at Estill in the same condition that they were when you saw them at Concord?

A. I suppose we could have sold them for $400 or $500.

Q. Was that their market value?

A. I would think so at the time.

Q. In the condition in which they were, what were they worth, in your judgment, per head?

A. I think they were not worth any more than for beef.

Q. Make some estimate.

A. I would say $40.

Q. $40 a head? Did you see those heifers, examine those particularly, notice them?

A. No, sir; except it may be one or two in the barn.

Q. I mean as soon as you got able to get out?

A. No; I did not.

Q. You saw them at Waltham and at Concord?

A. Yes, sir.

Q. Now, if they had reached Estill in calf that is all right
213 and hadn't dropped calves, assuming they were in calf, or with calf rather, what, in your judgment, would they have been worth per head at that time?

A. I suppose they would have been worth $550 anyway.

Q. Apiece?

A. Yes, sir.

Q. If any had aborted their calves what would they have been worth, in your judgment, in that condition?

A. Well, my judgment then and my judgment now might differ a good deal.

Mr. POLLARD: We make the same objection to that.

Mr. COSGROVE: I want what your judgment now is as to their value then.

A. My judgment now is they would not be worth over a hundred dollars.

(By the COURT:)

Q. You are speaking of their value at that time.

A. Yes, sir; at that time.

Mr. WILLIAMS: Judging by experience, results?

A. Yes, sir.

The COURT: Not exactly that. What was their market value? What do you think was their market value, not with calf, at that time and at that place, if you know?

A. I thought at that time they were worth $200, but I would not hardly buy cattle that had aborted.

To this ruling of the court the defendant at the time excepted.

Q. As I understand you, your judgment at that time was they were worth $200 ahead.

A. Yes.

214 Mr. COSGROVE: The question I ask you—don't answer it before the court tells you—my question is what you now think those cattle were then worth.

Mr. POLLARD: We object.

The COURT: I don't think that is the criterion. If a heifer with calf at that time and place had a certain market value it is competent for you to show it. If the same animal not with calf had a market value at that time and place it is competent for you to show that.

Mr. COSGROVE: I think that is probably within the rule.

The COURT: The question is the market value of the animal in the two conditions.

Mr. POLLARD: That is the same thing we objected to before. It is not the correct rule of damages.

The court overruled the objection, and defendant then excepted.

Mr. COSGROVE: What was the market value of those cows, arriving in the condition in which they did arrive?

The COURT: I understood him to say that at that time they were worth two hundred dollars a head, and had they arrived with calf they would have been worth five hundred and fifty dollars each.

215 Mr. COSGROVE: He said his judgment was they would be worth, arriving in the condition they did, $200.

WITNESS: My judgment at that time.

Mr. COSGROVE: That only applies to those that lost their calves?

A. Yes, sir.

Q. You don't mean that for the whole herd?

A. Yes, sir.

Q. I don't know whether I asked if you know of special injuries to any other animals?

A. I know that there was a calf there that was very badly injured.

Q. That is that calf that died; we won't say anything about that.

A. A cow, the Empress of Newton; I know she was lame, very lame.

Q. She was one of the aborted cows?

A. One of the aborted cows already been spoken of.

Q. Besides these aborted cows and those three bulls, did you notice any other injury in the balance of them further than the general appearance you have indicated?

A. No, sir.

Q. Do you recollect one of the bulls called Strathnaver?

A. Yes, sir.

Q. That is one of the three bulls that have been mentioned?

A. Yes, sir.

Q. What became of that bull?

A. I recollect we had a bull—I recollect we had three bulls.

That bull, I can't say now exactly what became of him. I know there were three bulls. I don't recollect them distinct enough to tell where each bull went.

216 Q. You are not able to state where they went by name?

A. No; I know where two went.

Q. What became of the two?

A. One bull was shipped to St. Louis; I forget his name. He was the bull with the swollen testicle. He was sold for beef.

Q. Where did the other one go?

A. The other went to Mr. Estill. I don't know what he did with him—Will. Estill.

Q. And the third of the three bulls?

A. I don't recollect where he went.

Cross-Ex.

Cross-examination by Mr. POLLARD, for defendant:

Q. What do you base your opinion of the market value of an aborted cow upon?

A. I base my opinion now on my experience with them.

Q. At that time. You have given what your opinion was of the cows at that time?

A. I have handled some aborted cows on the place. I have had cows abort.

Q. Before that?

A. Yes, sir.

Q. How many?

A. I suppose two or three.

Q. What did you know at that time about their market value?

A. As a breeder I discovered——

Mr. POLLARD: I say what experience did you have as to what the market value was?

A. The beef value would be the market value. On the grade cows it makes a difference. The value of the cow is as the weight.

Q. Had you known of any aborted cows being sold prior to that?

217 A. Yes, sir; I sold some myself; they were grade I sold.

Q. Did you know of any others except what you sold yourself?

A. No, sir; I cannot say I did.

Q. That is the foundation of your opinion?

A. Exactly; yes, sir.

Q. As to these three bulls you have spoken of, have you any personal knowledge as to their ability to serve?

A. No, sir; I know one bull was used.

Q. Was used?

A. Yes, sir; I had him tried myself.

Q. Is that the one Mr. McLachlan spoke of?

A. I don't remember whether it was the one McLachlan spoke of. I just took him, used him. We never got a calf from him.

Q. Did he serve a cow?
A. The one with a swollen testicle?
Q. The one you are speaking of.
A. Yes, sir; I think he served a cow.
Q. Which one was that?
A. The bull with the swollen testicle.
Q. He served the cow, as far as you know, properly?
A. Not very well; not what we would consider good service.
Q. What do you mean by that—"not very well"?
A. It requires a cow to have a pretty good humping in the back. When they do that we consider the service as pretty good.
Q. He didn't do that?
A. Yes, sir.

Q. Perhaps it was the fault of the cow.
218 A. Perhaps it was the fault of the cow. I am not an expert on the cow.

Q. It is the cow that does the humping?
A. It is the bull that does the service. That makes her hump.
Q. So far as the bull's performance was concerned, didn't he do it all right, as far as you could see?
A. I don't think he did, sir.
Q. What was there about his performance that was not according to standard *guage*?
A. Whenever he failed to do the work in making the cow hump, I don't think he done the work. He fell a little short of it, I think.
Q. Did you ever see him serve a cow more than once?
A. No, sir.
Q. Do you know whether that cow had a calf?
A. Yes; I know that cow was not with calf.
Q. Isn't it a very frequent occurrence that you have to take any cow two or three times to the bull before she has a calf? Isn't that a common occurrence?
A. It sometimes happens.
Q. Isn't it a very common occurrence?
A. If they are both all right.
Q. Every time?
A. If they are all right; yes.
Q. Isn't it a common occurrence that ordinary cows frequently have to be taken to the bull once or twice before they take with calf?

A. Whenever a cow fails to breed the first time we consider
219 it better to let the cow go over a month or two. I don't think it was the fault of the cow at all, sir.

Q. I ask you, as a common occurrence, if you think it strange that a cow don't conceive the first time she is taken to the bull—do you think that strange?
A. Not always; no.
Q. It is an ordinary occurrence, isn't it?
A. I don't think it is the general rule.
Q. Not the general rule; isn't it common?
A. Yes, sir.

Q. This is the only time you ever saw that bull?
A. Yes, sir.
Q. Then he did serve?
A. Yes, sir.
Q. And the only thing wrong about that was he didn't hump?
A. Yes, sir.
Q. That is all of it?
A. That is all.
Q. As to the other two bulls, did you ever see them?
A. Never did.
Q. Never took them out to try?
A. Never did.
Q. Your opinion that they were not serviceable was based upon that one fact?
A. Why, one bull when he walked wabbled; I didn't think——
Mr. POLLARD: He didn't walk steady?
A. No, sir.
Q. You didn't try him?
A. I didn't try him.
Q. You stated these three bulls were worth about forty dollars a head?
A. Yes, sir.
Q. Some of these bulls have been sold, have they not?
A. I know of one we sold.
Q. What did that bring?
A. It brought nineteen dollars in St. Louis.
Q. Do you know what the others brought?
A. No, sir.
220 Q. Do you know the name of that one?
A. No, sir; it was the bull with the swollen testicle.

Counsel for plaintiffs then read in evidence the deposition of Dr. Alfred H. Rose, taken on the 20th day of September, A. D. 1884, at the law office of R. Goldsborough Keene, in Baltimore, Maryland, before Murray Hanson, a notary public, on the part of the plaintiff-, in the presence of R. Goldsborough Keene, attorney for plaintiffs, and E. J. D. Cross, attorney for defendant.

Testimony of Alvord H. Rose.

ALVORD H. ROSE, of lawful age, being produced, sworn, and examined on the part of the plaintiffs, deposeth and saith:

1st question by attorney for plaintiffs. State your name, age, residence, and occupation.

Answer. My name is Alvord H. Rose; I am 27 years of age; I reside in Baltimore city, Maryland; I am a United States veterinary surgeon. I have been a veterinary surgeon for 8 years, and in the service of the United States for 18 months.

2d question by same. How long have you resided here?

Answer. Seventeen months.

3d question by same. What are your duties as veterinary surgeon of the United States?

Answer. I examine all imported cattle for contagious diseases coming into the port of Baltimore.

221 4th question by same. Where were you during the months of August and September, 1883?

Answer. In charge of the United States cattle quarantine at Waltham, Massachusetts, by order of the Government.

5th question by same. Please state what you know of the lot of imported Scotch cattle known as polled Angus-Aberdeen cattle in quarantine at that time at Waltham, Massachusetts.

Answer. They were in quarantine on my arrival there on the 27th of July, 1883. There were 382 cattle in all, in good, healthy condition apparently, and were being taken care of as well as the accommodations of the quarantine at that place would admit. They were consigned to Leverett Leonard and others. On the 2d & 3d of August, 1883, they were removed about 8 miles, to a farm at Concord, from the quarantine grounds by Mess's Leonard & others. On this farm they were put at pasture. About 2 weeks after their arrival on the farm I received notice that 30 of the animals were very sick, and to come and see them at once. In company with Dr. Thayer, of the Treasury Cattle Commission, I made an examination of the sick cattle; we found several of the animals' temperature varying from 101 to 105 degrees Fahrenheit, pulse quite weak and numbering 50 to 70 to the minute, respiration 15 to 20 to the minute.

222 Their general appearance was that of debility, the visible muc-us membrane very much conguested. In those animals whose temperature ranged the highest the extremities of the body were cold, appetite lost, rumination ceased, and diarrhœa and urine highly colored. Diagnosis was that the animals had received some irritant poison. Five died. There was no post-mortem examination, but we were shown some of the contents taken from the stomach of one of the dead animals, which contained a greenish powder similating Paris green. The man in charge of the cattle took us down in the field and showed us where they had eaten the poison, Paris green, on the stump of a tree. Of the five deaths mentioned above two of them were aborted calves or fœtus. No other abortions occurred while in quarantine on this farm. On the 12th & 13th of September, 1883, I made a final examination of the remaining 379 cattle; the result of said examination was I found no evidence of any contagious disease having existed or existing at that time. The cattle were in good, healthy, rugged condition. Those that had been sick on the day of departure, on the 13th of September, 1883, were sufficiently recovered to be in good condition. No evidence of the effects of the poison could be seen.

223 6th question by same. Did you or not certify as to their condition at that time?

Question objected to by counsel for defendants unless the certificate is produced.

Answer. I did certify in writing that the cattle were free from contagious disease and were a good, rugged lot of cattle.

7th question by same. I understand, Doctor, that of the five cattle that died 2 were aborted calves, so that only 3 of the original lot died from the effects of the poison. Am I correct?

Answer. Yes, sir.

8th question by same. You have stated that these deaths occurred about two weeks from the 2 or 3d of August, 1883, which would make it about the 16 or 17th of August, 1883, and that the cattle were shipped on the 13th of September, 1883, about four weeks later. State if, in your opinion, abortion would, after the lapse of so long a time, transpire from the effects of the poison referred to.

Answer. Not unless access to poison was made after that date—I mean from the date after original poisoning. Exceptionally it may occur, not generally.

9th question by same. State, if you please, how the breeding qualities of cows would be affected by abortions.

Answer. Abortion, being an unnatural condition and disorganization of the organs of generation of the mother, renders a cow
224 weak in those parts, so that a succeeding pregnancy renders her incapable of carrying her calves to successful termination.

10th question by same. So that, if I understand you correctly, cattle become, under such circumstances, almost valueless for breeding purposes?

Question objected to by counsel for defendants as leading.

Answer. I would not say valueless, but unwarrantable as breeders.

11th question by same. As a matter of fact, there was a severe collision between two trains at Nankin, Ohio, in which these cattle were greatly injured, the cars in which they were were thrown entirely from the track and several of the cattle killed, and sixty or seventy of the cows, after their arrival in Missouri, aborted their calves. From this statement of facts state what, in your opinion, was the cause of said abortion.

Question objected to by counsel for defendants on the ground that the question is not a full and fair statement of fact.

Answer. External violence is a common cause of abortion to cattle. If these animals were injured severely, some of those subjected to the injury would most likely abort their calves; others standing near those that had aborted, and being allowed to
225 smell of the membrane that covered the aborted calf, would produce undue excitement of the pregnant heifer or cow, and, in many instances, cause her to abort her calf.

12th question by same. If a cow has had an abortion is there likely to be a repetition of it?

Question objected to by counsel for defendant as irrelevant, as it has not been shown that any of these animals had previously suffered abortion.

Answer. Yes, sir.

13th question by same. Please state, so far as you know, about the ages of these cows, if you can do so; as to whether they were young or old cattle.

Answer. They were from one to three years of age, consisting of cows, heifers, and bulls.

Cross-Ex.

Cross-examination:

1st cross-question by counsel for def't. I understood, from your answer to the 5th question, that you first saw these cattle at the quarantine grounds of the Government, at Waltham, Massachusetts, about the 27th of July, 1883. Were not the accommodations at this place insufficient for so large a herd of cattle?

Answer. On that date; yes.

2d cross-question by same. Had they not been suffering from extreme heat, and had not some of the herd died from exhaustion?

Answer. Not that I had seen.

226 3d cross-question by same. Did you not notice that they were—or some of them, at least—suffering from exhaustion by the heat of the weather and from confinement on the steamer?

Answer. No, sir.

4th cross-question by same. Then your recollection is that while at the quarantine at Waltham, Massachusetts, they showed no symptoms of exhaustion or fatigue caused by heat or confinement in the vessel?

Answer. I saw no more signs of fatigue or exhaustion among these cattle than is generally seen among cattle coming off the ocean steamers in warm weather.

5th cross-question by same. Then you did notice that some of them did show the effects of heat and the voyage which they had just undergone?

Answer. Some of them were slightly affected; just what number I don't know.

6th cross-question by same. Was not the distance from Waltham to the farm near Concord, where you state the cattle were taken on the 2 or 3d of August, 1883, twelve miles instead of eight, as you have testified, and were not the cattle driven along the country road in the daytime?

Answer. About the distance I will not be positive, but always understood that it was about 8 miles, as I was informed by the people living there. They were driven from the quarantine to the farm on the country road in the daytime.

227 7th cross-question by same. You stated these cattle were part Angus and part Galloway. Can you recollect what proportion of them were Angus and what Galloway and what were cows, heifers, and bulls?

Answer. I do not recollect. They were mostly Angus and they were mostly heifers, as near as I can recollect.

8th cross-question by same. How many of these heifers did you notice or did you judge were with calf?

Answer. Never having examined them for pregnancy, cannot tell how many of them were with calf, but generally most all females are with calf when landing in this country.

9th cross-question by same. Is it not usual in importing cattle that those with calf are bought with that understanding, for purposes of importation?

Answer. Yes, sir.

10th cross-question by same. Who else did you see besides Dr. Thayer at the farm at Concord when you were called to examine the sick cattle?

Answer. John Cunningham, the foreman, and the man in charge of the cattle and a man who had been treating the cattle for their sickness.

11th cross-question by same. Was it not Joseph Childs?

Answer. It may have been; I do not recollect his name.

12th cross-question by same. You stated that there were thirty of the animals sick showing symptoms of mineral poison,
228 and have given their temperature, pulse, and respiration. What is the normal pulse, temperature, and respiration in healthy cattle?

Answer. Temperature, 100½ to 101 degrees; pulse, 30 to 40 to the minute, and respiration about 12 to the minute.

13th cross-question by same. Were not all the cattle on the farm at Concord in that pasture in one herd?

Answer. No, sir; some of the large bulls were kept in stables; the small bulls were pastured in separate fields, and the heifers and cows were kept in two adjoining fields.

14th cross-question by same. About how many in each field?

Answer. About ½ the heifers in each field.

15th cross-question by same. Can you say whether the 30 animals suffering from this poison, as you have stated, were from one field or from both?

Answer. They were said to be from one field. I saw them in the yard.

16th cross-question by same. Was not the Paris green that you saw near the place where the cattle went for water?

Answer. Yes, sir.

17th cross-question by same. What salt is Paris green?

Answer. Arcenite of copper.

18th cross-question by same. Has it a sweetish taste which makes it attractive to cattle?

Answer. Yes, sir; cattle will eat poison of any kind that is sweet.

229 19th cross-question by same. Did you notice Paris green at any other place than the stump which you have mentioned in your testimony?

Answer. I did not see any other there.

20th cross-question by same. Did you hear of any other places where Paris green had been found?

Counsel for plaintiff- objects to this question.

Answer. Yes; at one other place, but I did not see it.

21st cross-question by same. What is the ordinary period of gestation in cattle?

Answer. About 280 days.

22d cross-question by same. What is the effect of Paris green upon cattle?

Answer. Irritant poison.

23d cross-question by same. Does not the time when this effect is shown depend upon the amount taken, and would not the effect of a small dose be manifest later than that of a large one?

Answer. Not necessarily. Arcenite of copper when given beyond a poisonous dose sometimes will not act as quickly as a moderate dose, but generally large doses are most deadly.

24th cross-question by same. Would not the irridation and inflam-ation in the stomach and intestines of an animal which had taken Paris green poison the blood of an animal and cause the death of fœtus sooner or later?

230 Answer. That would depend upon the amount of poison absorbed into the blood of the mother.

25th cross-question by same. If there was sufficient amount absorbed, I understand you to say, it would have this effect?

Answer. Very probably.

26th cross-question by same. Would not a small amount of Paris green have this effect?

Answer. If sufficient to cause poisonous condition of the blood.

27th cross-question by same. Would not the irritation of the muc-us membranes of an animal caused by the presence of this mineral also produce the death of the fœtus if the animal was pregnant?

Answer. Local irritation of it would.

28th cross-question by same. Might not a poison of the kind, acting as you have stated, cause the death of the fœtus some time after the poison taken and then the health of the animal be injured by the presence of the dead fœtus, which would cause pyemia?

Answer. Yes.

29th cross-question by same. Might not the time intervening between the taking of the poison by this animal and its death or expulsion of the dead fœtus be a considerable time?

Answer. From 24 hours to about 3 weeks.

30th cross-question by same. Can you limit the time as you have in your above answer or is not the effect referred to in the

231 interrogatory dependent upon the amount of the poison taken and the condition of the animal who has so taken the poison, it being a robust animal or a weakly one?

Answer. We cannot give the time to a certainty, but the time given is of sufficient length for the poison to have had its effect in this particular.

31st cross-question by same. Do you intend by your answer to cover all possible cases which might have existed in the herd of cattle you have testified about, considering the amount of poison which might have been taken, the state of health of the animal,

and the age of the fœtus at the time the poison was taken, and limit the result to within three weeks after the poison — taken.

Answer. Not of the possible cases, on account of not knowing how much poison they had taken; but of the others that had taken the poison, three weeks I would consider a sufficient length of time, generally speaking.

32d cross-question by same. Then your opinion as an expert is that the injury to the animal which would cause abortion should have its effect within three weeks after the foreign substance was taken, though it had to act primarily upon the animal itself and then upon the fœtus.

Answer. As a veterinarian I would look for such develop-
232 ments to occur within that time or period, and if no unfavorable symptoms would occur within that time we would consider that animal partially recovered or recovering.

33 cross-question by same. Of the 25 cattle who recovered from this poisoning and who were shipped from Concord, did not a large part of them show the effects when they were shipped?

Answer. They showed symptoms of having been sick, but were recovering fast.

34th cross-question by same. You could hardly have considered that these cattle shipped on the 13th of September, 1883, were in rugged health, as you state you certified they were.

Answer. Considering the length of time that had elapsed since they had taken the poison and the improvement they had made in that time, I considered that they were in good condition for cattle that had been subjected to such treatment as they had.

35th cross-question by same. Don't you think, Doctor, that a certificate that they were good, rugged cattle was rather a strong statement under the circumstances?

Answer. No sir.

36th cross-question by same. Is it not a fact that when abortion begins in a large herd of cattle, many of whom are in a pregnant condition, that there is danger of its spreading?

Answer. Yes, sir.

37th cross-question by same. Is it not likely to occur from
233 other causes other than smelling the membranes, as you have previously stated?

Answer. Yes, sir.

38th cross-question by same. State what other causes are likely to produce it.

Answer. Sudden atmospheric changes, the heating of the membranes, drinking of cold ice water, eating of roots or grasses, terpentine and rosin, eating ergot of rye and wheat, eating of grass in pine districts that has been covered with snow, the eating of anything that will produce diarrhea or disentary, stimulating food and dry food given in large quantities, swelling the stomachs and causing the stomach to press upon the uterus, and causing an expulsion of the fœtus

39th cross-question by same. I wished you in your answer to con-

fine yourself to the causes of the spread of abortion in a herd when once begun, not abortion generally.

Answer. That would depend upon the original cause.

40th cross-question by same. You have testified that abortion is caused by external violence, if the animal is injured severely. Is not such abortion a mechanical effect as distinguished from abortion caused by disease?

Answer. Yes, sir.

41st cross-question by same. Is it not dependent upon the severity of the shock?

Answer. In some cases, yes; but on account of the predis-
234 position some cattle have depending upon their anatomical formation and nervous excitability, less shock is necessary to produce abortion in some than in others.

42d cross-question by same. From your knowledge of cattle, are not the Angus and Galloway preferred on account of their hardy disposition, capacity to endure fatigue, and their capability to live and fatten in a cold climate on coarse forage?

Answer. As such they are considered by some; never having seen them in conditions sufficient to prove these qualities in them, I cannot positively say whether they are so or not.

43d cross-question by same. But I understand you to testify that abortion from violence among cattle of a delicate constitution is more likely to occur than among those of a hardy breed. Is this not so?

Answer. Delicacy is a common cause of abortion. The other extreme, plethora, is an exciting cause of abortion.

44th cross-question by same. It would take more violence to cause abortion in an animal of a hardy breed and in rugged health than in an animal of delicate constitution and out of condition, would it not?

Answer. It would, sir.

45th cross-question by same. Abortion from violence, being, as you have stated, mechanical, should manifest itself soon after
235 the injury had been received, should it not?

Answer. That would depend upon the amount of concussion upon the uterus or fœtus.

46th cross-question by same. If this concussion was severe and the moving cause of abortion it would manifest itself soon after it was received necessarily, would it not?

Answer. It would be very apt to.

47th cross-question by same. It would be much more speedy than that resulting from disease caused by poisoning or inflam-a-tion such as you have mentioned from the Paris green taken by some of this herd?

Answer. It would be more speedy than when caused by disease set up from taking Paris green.

48th cross-question by same. Can you state as an expert how soon abortion caused by a violent concussion would take place in this class of cattle; within a day or so, ought it not?

Answer. If produced by violent concussion it ought to occur within

a few days, provided such concussion was direct upon uterus or fœtus.

49th cross-question by same. I understand you to have said that abortion from concussion is caused by a severe blow upon the uterus or fœtus.

Answer. Yes; directly or indirectly.

236 50th cross-question by same. What do you mean by indirectly?

Answer. When the injury is received at or near the uterus or fœtus the direct action of such injury is where the animal is struck. The concussion received by the uterus is the indirect effect of the injury.

51st cross-question by same. Cannot the spread of abortion in a herd from the cause you have mentioned in your former answers be arrested by removing the cattle affected from the rest of the herd?

Answer. If produced by the smelling of the membrane it can be arrested by isolating the affected animals.

52d cross-question by same. Would it not have been prudent to have isolated the affected animals at once?

Answer. Yes.

53d cross-question by same. Do you know G. S. Shipard, general agent of the Erie and New England line, and have you ever conversed with him on this subject?

Question objected to by counsel for pl'ff-.

Answer. I don't know whether that is his name or not. I was approached by an agent for some railroad on this subject.

54th cross-question by same. When did this happen and what occurred between you and him?

Question objected to by counsel for plaintiff-.

Answer. At the custom-house in Baltimore, some time in May or June, 1884; very little was said about the matter.

237 55th cross-question by same. Was this a general conversasation, or did you make him a specific statement on the subject?

Question objected to by plaintiffs' attorney on the ground that the witness is being cross-examined on matters and things upon which he was not examined in chief.

Answer. As near as I can remember, it was a general conversation, with a few questions pertaining to the subject of abortion to cows. There was no written statement, as near as I can remember.

56th cross-question by same. Was not this conversation something more than a general conversation concerning abortion in cows, and did you not give him your knowledge of the poisoning of the cattle at Concord and the circumstances connected with the same?

Question objected to by pl'ffs' counsel.

Answer. I may have done so, but don't remember speaking of these cattle's condition at Concord more than in a general way; possibly I may have done so.

57th cross-question by same. Don't you think you did so?

Question objected to by pl'ffs' counsel.

Answer. I may have done so.

58th cross-question by same. Do you not remember stating to him that you saw the Paris green there, and that it was thought that this was the cause of the illness of the cattle?

238 Question objected to by pl'ffs' counsel.

Answer. I may have done so; I don't remember positively.

59th cross-question by same. Did you not state to him that you thought this poisoning caused the aborting of the calves?

Question objected to by pl'ffs' counsel.

Answer. Now, that this question has been brought up, I remember telling him that the abortions that occurred at Concord, I thought, were produced by the mothers eating Paris green. Further than that I could not have given my opinion upon the causes of the abortions that occurred among these cattle.

60th cross-question by same. Did you not state to him that the abortions under these circumstances would be manifested in from 4 to 6 weeks?

Question objected to by pl'ffs' att'y.

Answer. I don't think I did.

61st cross-question by same. Did you not tell him also that at the time of the shipment, about the middle of September, a number of those that were poisoned still looked badly?

Question objected to by pl't'ffs' attorney.

Answer. I stated to him that some of those cattle that had taken of poison looked as if they had been sick, but particularly mentioned to him that they were rapidly improving, and I thought would soon recover from the effects of the poison.

Re-ex.

Re-examined:

239 1 question by att'y for pl'ffs. Doctor, in spite of all the learned and varied theories of the counsel for the defense, is it not almost conclusive that the abortions occurring four or five weeks after the poison, which made sick some thirty head of cattle and did not apparently affect any of the rest, resulted from the collision rather than the poisoning which killed three at once and made the others very sick?

Question objected to by counsel for defendant as not proper on re-examination and does not state the facts properly.

Answer. As the cattle that were poisoned were separated from those that had been in the same field with them, there would be little danger of the abortion spreading and affecting others unless they had themselves taken the poison. If four weeks had elapsed between the taking of the poison and the collision taking place, and no abortions occurring during that time, I would say that the effects of poison had passed off. If when the collision occurred abortions appeared soon after among the cattle injured by such collision, I naturally suppose and, in fact, look upon the collision as the cause of the abortions, provided the proper precautions of treating them after the collision had been carried out.

ALVORD H. ROSE, D. S.,
U. S. Vet. Inspector.

240 Subscribed and sworn to before me on this 22nd day of September, A. D. 1884, at the place and within the hours first aforesaid.

MURRAY HANSON,
Notary Public.

Testimony of Chas. E. Leonard.

CHARLES E. LEONARD, sworn on the part of the plaintiffs, testified as follows:

Direct examination by Mr. COSGROVE:

Q. Where do you reside?
A. I live in Cooper county, at Bellair.
Q. How long have you resided there?
A. I was born there.
Q. What business are you engaged in?
A. I have been a farmer and stock-grower all my life.
Q. What kind of stock?
A. Principally short-horned cattle; various kinds.
Q. Do you live on the farm where your father resided?
A. Yes, sir.
Q. What business was he engaged in?
A. About the same as I am—stock farming.
Q. Was he a breeder of thoroughbred cattle?
A. Yes, sir; he bought his first thoroughbred cattle the year I was born.
Q. That is over twenty years ago?
A. Just forty-nine years ago.
Q. Have you been engaged in handling these black cattle—Scotch cattle?
A. Yes, sir.
Q. How long?
A. I went over to Scotland in May, 1883, in connection with Abiel, Mr. Estill, and Mr. Elliott. We went over together.
241 Q. Did you examine these cattle of the Leonard Brothers—you are one of the plaintiffs?
A. Yes, sir.

Q. You saw those cattle in Scotland?

A. My brother Abiel and I bought three hundred and fifteen cattle. We brought over in this shipment 315. My brother Abiel and I bought them there and shipped them.

Q. What did you buy them for—what purpose?

A. We bought them, of course, only for breeding purposes; didn't bring them for beef, brought them entirely for breeding purposes. We thought they were good cattle, hardy cattle, and would be worth something to our country.

Q. What was their color?

A. All black and hornless.

Q. No horns?

A. No horns at all.

Q. And all black?

A. All black.

Q. Did you see them about the time they were shipped from Liverpool?

A. I and my brother Abiel bought these cattle in Scotland. I didn't superintend the shipping of them. My brother and Mr. Estill and Mr. Elliott did the shipping of them.

Q. Where did you see them next after you left Europe?

A. I got back to New York—I think it was the last day of August. I met my brother Leverett there. He had just got there, and he told me of this——

Mr. COSGROVE: Never mind what he told you; tell what he did.

242 A. We went there, up to Concord, to see the cattle. I hadn't seen them, of course, since they were bought; that was about two months.

Q. State, Captain, their general appearance and condition when you saw those cattle.

A. The cattle had materially improved; looked much better than when shipped.

Q. What was their condition?

A. They were in good condition. As we proposed to sell these cattle, to put them on the market, as a matter of course we tried to take the best care of them just as if we were handling them for show purposes; that is the way we tried to handle them. The cattle had materially improved—that is, in flesh, of course; looked better.

Q. Was that before or after the taking of the poison, Paris green?

A. That was after they had taken the poison. That was the reason I went up to see the cattle. I didn't propose to have gone there; I was to come back directly home.

Q. How long did you remain there?

A. I think I was there two days. I don't remember definitely.

Q. When did you next see the Leonard cattle or the Estill cattle?

A. I saw them probably a couple of days after they arrived at Mt. Leonard, in Saline county.

Q. What was their condition generally?

A. Well, they showed evidently they had been in a wreck.
243 Some of them were crippled; and, of course, the cattle, when I saw them, they had filled up; didn't look gaunt specially; some were crippled; of course, cattle with no horns wouldn't be scratched and scarred up.

Q. Will you just describe, as no other witness has done so, whether these cattle have any hair different from the ordinary cattle of this country—whether it is longer or shorter.

A. Yes. Galloway cattle have much more hair on them than our short-horned cattle or any native cattle of our country. The Angus cattle—I don't think there is very much difference in that respect. These of ours were part Angus and part Galloway.

Q. How many shipments have you made or been interested in of these cattle from Scotland?

A. I have been interested only in two.

Q. How many shipments have you and your brother made, separately and jointly?

A. Two I was interested in. My brother made one before; I think only one other; made that in 1882.

Q. Did you see each one of these shipments after they arrived in this country?

A. I saw the two latter shipments—one that went to Boston and the one that went to Baltimore. I superintended the unloading of the cattle that went to Baltimore.

Q. When was that?
244 A. I think they got there during the latter part of September, 1883.

Q. How many were there in that shipment?

A. 460 or 458. I won't be right positive. I put them in quarantine—the last shipment—myself.

Q. What experience, if any, have you had in shipping cows that were breeding cows—those in calf—by rail other than this?

A. I have been an exhibitor of short-horned cattle round at fairs; cows in high condition; cows even well along in calf.

Q. For nearly all your life?

A. Yes, sir; ever since, you might say, the war. There was not very much of that in 1860, but after that, in 1867 and '8; from that time on.

Q. How many cows were there in this shipment that came to Baltimore?

A. I think we had about sixty cows in the shipment. Most of that was bulls. I think probably out of 460 something like 60 cows. I have not looked at our catalogue to refresh my memory.

Q. I will ask you this question: Judging from your experience, as based on what you have stated, of the shipment of cattle across the ocean, a favorable voyage, and thence by rail after an intermission, as these cattle had at Concord, to Missouri, aside from any accident, would it be sufficient——

245 Mr. POLLARD: We object. We say as to this science he has had no experience. He has had only one experience, in cool weather, in the fall.

The COURT: I don't think the witness is qualified to speak of the effect that might be produced by an ocean voyage upon cattle. He is certainly qualified to speak as to the transportation of cattle by rail. He can give an opinion as to whether that would be liable to bring about abortions.

(By Mr. COSGROVE:)

Q. Therefore I will ask you, Captain, if the transportation of those cattle by rail from Boston to Missouri without any accident would be sufficient in itself to produce abortion of the cows.

A. I don't think so, sir, at all. I will just state my experience hasn't been shipping cattle for eight or ten miles over railroads. I have been shipping them for 100 or 200 or 300 miles—a couple of hundred, at least.

Q. You are not confined to just one or two fairs around the country?

A. No, sir.

Q. I will ask you if you were acquainted, say in September and October, along there—the fall of 1883—with the market value of these black cattle in the markets of Missouri.

A. I was at stock sales. I know how cattle sold.

Q. What, in your judgment now, would these heifers have been worth per head had they arrived here in the same order and
246 condition that they were in Concord when you saw them?

A. Well, sir, I suppose they would have brought as much as $450 to $500.

Q. That is, heifers?

A. Yes, sir.

Q. Heifers—those that were how old?

A. These cattle, I think, were pretty much all of them two and three years of age. There were probably a few younger, but very few—that is, from 18 months to 3 years of age.

Q. You think, then, that heifers ranging from 18 months to 3 years were worth——

WITNESS: I will stay right at $500.

Q. What did you say?

A. I will stay right at $500. I would suppose certainly between $450 and $500.

Q. Now, what would the same animals—heifers, cows—be worth if they had aborted their calves?

A. About all the way I could answer that question would be the opinion of men who are buying fine stock, as I have heard them express it. Right in regard to this thing I have no experience. I never put up.

Mr. POLLARD: If he has had no experience, then he is not competent to speak.

(By Mr. COSGROVE:)

Q. I will ask you as a breeder of cattle, a man who has been handling cows, blooded stock all your life, what would have

been the market value of such cows if they had aborted their calves?

247 Mr. WERNER: I wish to call your honor's attention more particularly to an objection Mr. Pollard made. Ordinarily such a question would be competent. What is the market value of an abortive cow, if it has a market value, in a case where no better evidence were capable of being produced by the parties? We have a case here. It has been shown in evidence already introduced that track has been kept of certain of these aborted cattle. Take, for instance, Heather Bell, of Farmton. She aborted; they kept track of her; she went to Kansas City and was sold. We will introduce the record later showing the result of that sale. I may say as a matter of fact she was sold for $805. Here a gentleman says the value of cattle is $500. It is to their advantage, if they are allowed to introduce this evidence, to conceal from this jury the actual damage. If that is the fact, whether or not they really suffered a pecuniary loss by reason of abortion to certain of these animals, we know in certain instances they suffered no pecuniary loss. Whether they did suffer any pecuniary loss can be shown as a matter of fact in each particular instance, for each particular animal was capable of being identified. Heather Bell—it turns out they lost noth-
248 ing on her by reason of abortion. We do not question the fact; it is quite probable that the value of each of these cows which aborted was materially depreciated. We simply say you can show us by evidence what that actual depreciation in value was; you can show whether they were sold; you can show whether you have them in your possession now, and whether they have bred since then, and how often they have bred; and, possessing that evidence, as we must presume they do possess it—because if they do not possess it it is their misfortune—possessing that evidence and it being now within their power to produce that evidence, how can it be competent to give in evidence the opinion of this man, which is only speculative and could only be received, if ever competent—which we seriously question in our minds—could only be received in case there were no better evidence.

The COURT: Suppose they should ask a witness what one of these heifers sold for that had lost a calf; suppose they show in the first place that a heifer with calf is worth $450, and then that they should ask what a particular heifer sold for, the witness should answer that she sold for $10, then would you not insist that that was not a
249 proper criterion of damage, because if the animal was sold for less than the market value it was plaintiffs' own fault?

Mr. WERNER: That would be a matter we would have to introduce rebutting testimony on to show that they had sold her for less than the market value.

The COURT: The rule, as I understand, is the other way. In the first place, they show what the market value was if the animal had arrived in the condition in which it was shipped; in the next place, they show what the market value of the animal was (its actual market value) in the condition in which it arrived. *Prima facie*

the difference between the two amounts is the measure of damages. Then it is competent for you to show, as in the case of this animal you name, that they didn't in fact sustain that loss. If you showed that fact, of course, you would be entitled to the benefit of it. You cannot change the rules of law for this particular case. The measure of damages, in my opinion, is the difference between the market value of the animal if it had arrived in the condition in which it was shipped and the market value of the animal in the condition in which it actually arrived.

Mr. WERNER: I would concede that to be the exact rule if we had equal means of getting at this testimony that they have, but it is something peculiarly within their knowledge. They are
250 keeping it away from us and from the jury. The presumption is if they offer this speculative testimony the other would injure them.

The COURT: I don't understand that the difficulty in making the necessary proof can alter the rules of law. If it be true that the market value of one of these animals after it had lost its calf was $200 less than it would have been if with calf, that *prima facie* is the loss on that particular animal; but if, in point of fact, the plaintiffs sold that animal for $500, you can show that fact, and in that event they would not be entitled to recover anything. A cow or heifer with calf (say when it arrived in September) may have been worth $500; by reason of not being with calf at the time her market value may have been $200 less; a year from that time, after she had been served again, her value may have been regained. Now, I don't think that fact would deprive the plaintiffs of the right to recover the actual loss as it existed when the cattle arrived.

Mr. POLLARD: They are entitled to recover their actual loss whatever it is.

The COURT: As estimated at the time of arrival?

Mr. POLLARD: We say they must prove that by the best evidence; that they are required to prove what the actual loss
251 was without any fault of their own. To ask the question of the difference between an animal sound and an animal aborted at that time would be one way, but when it does appear they have other evidence we should have that. Your honor can see the difficulty of that. If we knew all about it we could have traced all these animals. They have had it in their power to trace the history of each particular animal—as to whether it was sold and for what it was sold and when it was sold. If it ran along for a year or two and sold for as much it would sell for originally there would be the question of keeping; but what we say is: having it in their power, they must show those facts, and the burden is upon them to do it.

The COURT: Then we would be immediately confronted with this difficulty: If they were to show that all these cattle that lost their calves were sold for $30 or $50 or $10 each, you might, with reason, insist that that was not the proper criterion of value, because they may have sold them for less than they could have got for them in the open market.

Mr. POLLARD: That is just what they have been doing.

Mr. COSGROVE: No.

The COURT: That demonstrates that we must adhere to the fixed rules of law. Inasmuch as the damage complained of con-
252 sisted, in part, in the fact that certain of these cattle lost their calves, it appears to me to be competent to show what the difference in value was in the fall of 1883, when these cattle arrived in Saline or Howard county, between an animal that was then with calf and liable to have a calf within the next two or three months and one that had aborted its calf.

Mr. POLLARD: I concede that unless it appears they have not the power to prove its value exactly.

The COURT: When they have shown that fact and shown that the loss of calves was due to the fault of the defendant that difference in value *prima facie* is what they are entitled to recover, then the burden shifts upon you to show, if you can, that they really didn't sustain such loss, because they made sales of stock at such figures that the loss did not occur.

Mr. POLLARD: That might be if the testimony was in our power. It is in their power; not in our power.

Mr. COSGROVE: The gentleman assumes we are trying to conceal something. It is not the fact; it is not a fair assumption. We will account, so far as we can, for every one of these animals.

Mr. POLLARD: I say, as appears from the evidence, you lost the power to do that from failure to identify these cattle.

253 The COURT: I will let you establish by this witness the difference in the market value in that county as between heifers or cows with calf and those not with calf.

Defendant at the time excepted to the above rulings of the court.

(By Mr. COSGROVE:)

Q. Now, Captain, I will ask you what was the market value of those cows if when they reached here they had lost their calves.

A. Not exceeding one-fourth of what their value would have been had they got here in proper condition; that would be my judgment.

Cross-Ex.

Cross-examination by Mr. POLLARD, for defendant:

Q. Have you had any experience in selling aborted cows?

A. No experience in selling. I have been to a good many public sales of high-priced cattle.

Q. Any cows that had aborted ever offered at those sales?

A. Yes, sir; and I have known cows——

Mr. POLLARD: Let us get through with that.

A. Yes, sir.

Q. Where?

A. Let me say I have known cows put up in this way: they

wouldn't guarantee with calf; that they had lost calves; they wouldn't guarantee them to be breeders.

Q. That is not the question; the question I asked you is whether you have had any experience or known of cows that had aborted being put up at public sale.

254 A. No; I don't think I ever attended a sale where there were cattle put up simply as aborted cattle. I know the general feeling of cattlemen on that; that is what I was trying to give you if I can have the privilege of giving it; I don't know whether I can.

Q. I want to get at the basis of your market value, whether you know of any sales.

A. That is exactly what I am trying to get at.

Q. Do you know of any sales of aborted cows?

A. I know we don't put these cattle up as aborted cattle; we cannot put them up as such kind of sales.

Q. You don't know.

A. We have never done it. If they put them up they don't warrant them. The feeling of cattlemen——

Mr. POLLARD: He don't answer me. I want to know what sales he knows of.

Mr. COSGROVE: The judgment of cattlemen.

WITNESS: The judgment of cattlemen; experienced men in regard to non-breeders—aborted cows—I don't know how to answer any other way.

Mr. POLLARD: I object to any statement of that kind; he wants to give the feeling among cattlemen as to aborted cows.

The COURT: He may not have heard of any sales, yet he may have other knowledge of what that kind of cattle were worth. What is the next question?

Mr. POLLARD: I put no question; he was going on to tell a story about it.

255 The COURT (to the witness): Don't say anything further until you are asked some question.

(By Mr. POLLARD:)

Q. You made a sale at Kansas City that fall, didn't you?

A. Yes; my brother and I together.

Q. Which brother?

WITNESS (continuing): The cattle were never at my house. I never had any of the handling of this bunch of cattle. They were not at my house; they were handled——

Mr. POLLARD: This Kansas City sale was had after the division of your cattle?

A. Yes, sir. My brother Leverett and I had half the cattle. They were up on his place. I lived some sixty or seventy miles from him. His and my part of the cattle he was handling up there, with the exception of fifty on a farm of mine some four or five miles from his place. I never had any of these cattle under my supervision.

Q. Never had any at your place?

A. No, sir; not at my farm where I live.
Q. You and Leverett took half of the cattle?
A. Yes, sir.
Q. That were brought back?
A. Yes, sir.
Q. Then they were left—yours and Leverett's cattle were left at Leverett's place under his supervision?
A. Leverett's place, with the exception of fifty carried out to a place of mine five or six miles from my brother Leverett, that I owned in Saline county.
256 Q. Who had charge of those?
A. I had a man on the farm, Mr. Olcott. I have never known any particular damage to those in this transaction.
Q. Fifty-seven cows?
A. I think just fifty.
Q. There was no trouble with those?
A. No; I knew nothing about them. I could not testify in the case at all. I didn't handle the cattle.
Q. What do you mean by saying that they were not damaged to amount to anything?
A. That there was no estimate of damage—that is my recollection—to those fifty head of cattle. We didn't think any were hurt at that time to tell anything in regard to them.
Q. You did take the cattle to the Kansas City sale?
A. Yes, sir; my brother took the cattle.
Q. You and Leverett?
A. Yes, sir.
Q. The lot belonging to you and Leverett?
A. Yes, sir.
Q. How many?
A. I don't know. I paid no attention to the sale at all.
Q. Were you there?
A. I was up there. I didn't superintend it at all. I was round among the cattle. I didn't know a thing as to the number.
Q. It is under the charge of Leverett?
A. Yes, sir; Leverett, Will., and Abiel superintended the sale.
257 Q. Did they all go up together—your cattle and Abiel's and Will.'s.
A. I suppose they were shipped on the same train.
Q. Were they kept separate at the sale?
A. I suppose they were. I say I don't know about it. I don't know anything in regard to the sale at all, for I didn't pay any attention to it.
Q. Have you seen that report of that sale as reported in the Breeders' Gazette?
A. No; I don't know; it has been so long. I saw it at the time, I suppose, and I was there at the sale, but I really have not seen it to refresh my memory since as to what the cattle brought.
Q. Do you remember what the cattle sold at?

A. No; I don't. I suppose that was the fact. We accept the report of the Breeders' Gazette. I have not tried to recollect about it.

(Book shown to witness.)

The COURT: What page is that?

Mr. POLLARD: Page 637.

WITNESS: I would say that would be correct. These cattle belonged to Charles E. and Leverett.

Q. Yours were all Galloways?

A. No; they were not all Galloways there. I think Jingo was sold there. That was Angus. Jingo, I remember, was sold.

Q. You are satisfied that is a correct report?

A. Yes, sir.

Q. On pages 629 and 674?

A. I suppose that is a correct report.

258 Mr. WILLIAMS: If you want to use the Breeders' Gazette, we will take that as a correct report in that Gazette. Take all the sales. We will refer to some; you can do the same. We will understand that book may be considered in evidence.

The COURT: That obviates the necessity of further identification?

Mr. POLLARD: Yes.

(By Mr. POLLARD:)

Q. Are you able to state the names of any cattle that were sold at that sale or whether there were any of the cattle that have been spoken of here as having aborted?

A. I don't know about the cows. I remember some of the bulls.

Q. What ones do you remember?

A. I remember this bull Jingo. I remember the bull Lord William.

Q. Were they bulls that were injured in the wreck, as far as you know?

A. I think the bull Lord William. He was injured in a foot—hind foot, I think.

Q. Did he recover before the sale?

A. Yes; he got over this lameness. That is my recollection.

Q. Isn't he the only bull in the lot that showed any visible injury when they arrived at home?

A. I could not say about that, for I never made any examination of the bulls. I remember this bull Lord William. I don't remember as to the identity of others in the sale.

259 Q. Were you not up there when the cattle arrived?

A. No, sir.

Q. How soon after?

A. I was there the second day after; just looked through them in a general way; didn't pay any close attention.

Q. Were you not there when the division was made?

A. No, sir.

Q. Leverett attended to that for you?

A. Leverett and a boy divided them. We have not been very particular as brothers. We thought what one lost the other one got.

Q. You stated you bought 315 head in Scotland?

A. That is my recollection of the number.

Q. Do you remember how many of those were bulls and how many were heifers and cows?

A. I think there were fifty-five bulls; that is my recollection.

Q. The rest?

A. The rest would be females; almost all of them cows and heifers; a few calves.

Q. You call a heifer a female that has not had a calf?

A. Yes, sir; and one that is——

Mr. POLLARD: How many cows were there in that lot?

A. There were scarcely any of these that were over three years of age, I think.

Q. How many that had calves?

A. I don't think there could have been over a dozen,
260 twelve, still I would not be positive as to that.

Q. Can you tell the number of them, what were the different ages, how many were one year and how many were two years?

A. No; I could not tell, only from the catalogue. I know the cattle we bought in May were coming two-year-old heifers. A good many were two. A good many had been two along in the fall. A good many were two years. That is all a matter of fact in the catalogue.

Mr. COSGROVE: The catalogue contains all?

A. Yes; that catalogue contains all. I compared it and the ages, and it was all right.

Redirect.

Redirect examination by Mr. COSGROVE:

Q. These are the catalogues, are they not?

A. Yes. This is the catalogue of the Galloway cattle.

Q. What is the other?

A. The other is the catalogue of all the Angus cattle that were imported at that time, but also some cattle that we imported in September of that year.

Q. The same book?

A. Some of the Baltimore shipment are in this catalogue; but all of the importation of the Boston shipment are in here. There is no trouble telling one from the other.

Q. You reside in Cooper county, how far from Mt. Leonard?

A. About sixty miles. Further than that by rail.

261 Q. You had no personal supervision of the cattle up there?

A. None at all.

Q. You have a farm in Saline county and a farm in Cooper county?

A. Yes, sir

Wallace Estill.

WALLACE ESTILL, sworn on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. Where do you reside?
A. I live in Howard county.
Q. How long have you lived there?
A. All my life.
Q. What business are you engaged in?
A. Farming and stock-raising.
Q. State the extent of your dealing in stock and the character of the stock in which you have been dealing.
A. Well, I suppose for twelve or fifteen years I have been handling the finer classes of cattle—thoroughbred cattle—short-horned and Angus.
Q. You are one of the plaintiffs in this case?
A. Yes, sir.
Q. Who were your partners?
A. Mr. Elliott and my brother were interested with me.
Q. Were you in Scotland when this stock was bought?
A. No, sir.
Q. When did you first see the shipment of stock in controversy in this case?
A. When they were taken from the cars at Estill, Missouri.
Q. Were you present at the time?
A. Yes, sir; I was present.
262 Q. Did you see how they were loaded in the cars?
A. Yes, sir.
Q. How many were in a car?
A. Well, they would average from ten to fourteen.
Q. How were the cars fixed?
A. They were nicely bedded, feed and everything arranged so that they could feed and water the cattle thoroughly.
Q. Were you there when they were unloaded?
A. Yes, sir; I was there when they were unloaded.
Q. Was any one else present?
A. I think my brother, and probably Mr. Elliott.
Q. I will ask you what steps were taken at the time that they were unloaded to ascertain if any were injured, and, if so, the nature and the extent of the injuries.
A. My recollection of the way they were unloaded was that they were just driven out of the cars; as they were driven out the appraisers made an——
Mr. WILLIAMS: Did they examine each one separately?
A. Yes, sir.
Q. Were you present there assisting in any way?
A. No, sir; the appraisers asked myself and all those interested to get away.

Q. You were not there to appraise?
A. No, sir; I was off to one side. I had nothing to say.
Q. Where were the cattle kept?
A. At what time?
Q. After they were taken off.
263 A. You mean out of the yards?
Q. After they were taken off the cars.
A. They were kept on my place right close to the depot grounds. We had some trouble with the railroads. We refused to pay the transportation until we could get it settled.
Q. Did you keep them up for the purpose of holding them till they were examined?
A. Yes, sir; they were not taken out into the field at all until they were examined.
Q. After they were put in the field, how long were they kept on your place?
A. I think they were kept there at least ten or twelve days before my brother got his portion.
Q. Were you with the cattle frequently?
A. Yes; I was with them every day nearly all the time—that is, the cattle in the field.
Q. State whether any of those aborted their calves while they were on your place. If so, how many to your personal knowledge?
A. Yes, sir; there were five or six of them that lost their calves in the field.
Q. On your place?
A. Yes, sir.
Q. Did you take any cattle to Kansas City for sale; if so, what?
A. We have never made but one sale away from home; that was at Kansas City.
Q. How many head of cattle did you take to Kansas City?
A. About thirty.
Q. How did they compare with the remainder of your stock as to condition for market?
264 A. They were very much the better portion of the cattle, for we had to have competition.
Q. State whether the balance of the cattle were in condition to be put on the market.
A. No; it took some of them at least six or eight months to be put in condition.
Q. What was the trouble?
A. They were not in condition.
Q. What do you mean by "not in condition"?
A. In the first place, some of the cows had lost their calves; some had been bruised; some maimed. They showed as all cattle do in a wreck. They were in such a condition they would not thrive, and we, of course, could not put them on the market.
Q. They were not marketable at that time?
A. No, sir.
Q. This cow Mr. Kingsbury bought at this public sale, did he?
A. Sold at public sale.

Q. Was there any arrangement made in regard to it before you took it up there?

A. Mr. Kingsbury is my nearest neighbor. He took a fancy to two of these cows, as they were the best bred cows we imported. He took a fancy to this, but he said he didn't know her. He says, "If you will guarantee this cow, I will buy her." We guaranteed her. We sent her up.

Q. If you would do what?

A. If we would guarantee her.

265 Q. He had that understanding with you before you sent her to Kansas City?

A. Yes, sir.

Q. Did he buy her in connection with other cattle?

A. Yes, sir.

(By the COURT:)

Q. What was your guarantee?

A. That we would take her back if she didn't breed.

(By Mr. WILLIAMS:)

Q. What is the name of that animal?

A. It is black. I always called her the Black Knight.

Q. Heather-bell, of Farmton?

A. I think that is it. I knew her better as the Black Knight.

Q. I will ask you if you know what became of that cow, Heather-bell, this Kingsbury cow.

A. She produced one calf and died.

Mr. POLLARD: We object.

Mr. WILLIAMS: We don't insist on it.

Mr. POLLARD: They sold the cow and got the money for it.

Mr. WILLIAMS: We don't insist on it.

(By the COURT:)

Q. What did that cow sell for?

A. I think it was about $805.

(By Mr. WILLIAMS:)

Q. I will ask you whether you were acquainted with the value of black cattle at that time and place.

A. Well, sir, I have been somewhat of a dealer. I think I ought to be able to know something.

Q. You know whether you are acquainted?

A. Yes, sir.

Q. What would this Kingsbury cow have been worth if she had arrived in good order and condition?

266 A. It would have been worth a thousand or twelve hundred dollars.

Cross-Ex.

Cross-examination by PERCY WERNER, Esq., for defendant:

Q. Mr. Estill, you say that these animals were inspected as they left the cars?

A. Yes, sir.

Q. That is as each animal left the car it was examined by the inspectors?

A. Yes, sir.

Q. Then where were they taken?

A. They were put in my field right there.

Q. How far was that from the unloading station?

A. We just opened the gates and turned them in the field.

Q. The inspection, then, was made by these inspectors before they got into the field?

A. Yes, sir.

Q. Do you know what date they arrived at that place?

A. I won't be positive of the date. I think it was the 22nd of September. I won't be positive.

Q. This station is Estill?

A. Yes, sir.

Q. You brought your cattle from Chicago by the Wabash, I believe?

A. Yes, sir.

Q. Entirely separate from the Leonard cattle?

A. Yes, sir.

Q. The two lots were separated at Chicago and yours brought on at a different time and different route, I believe?

(No answer.)

Q. Now you say while in this field where they were kept for 10 or 12 days before they were divided between you and your brother there were some abortions there.

267 A. Yes, sir; five or six.

Q. Did you see these personally?

A. I saw, I must say, four or five. I didn't find all of them.

Q. You mean the fœtus of it?

A. Yes, sir. For instance, I would go into the field and see a cow that looked as though she had had trouble and dropped a calf, and I would go to work to look for it.

Q. What were the indications that a cow had aborted?

A. You will notice that parts are inclined to be swelled; a little loose; then sometimes an unpleasant smell.

Q. You went about these cattle a deal, did you, while in the field there?

A. I was with them most all the time.

Q. You noticed four or five—five or six—which had the appearance of having aborted?

A. I noticed these cattle; then I would look for the fœtus and find it.

Q. You found all?

A. No, sir; I didn't find all. I said I found four or probably five.

Q. Do you know whether those abortions took place after the cattle were received there?

A. I could not have found them if they hadn't taken place.

Q. That is, find the fœtus?

A. Yes, sir; they could not have dropped it somewhere else.

Q. Did you attract anybody's attention there to finding them?

A. I spoke about it.

268 Q. Your cattle were all numbered, I believe?

A. My recollection is they were marked on the hip, a clip on the hip.

Q. The means of identifying them were different from the means adopted for the Leonard cattle, which was a tag in the ear?

A. I don't know anything about the Leonard cattle.

Q. All the way you had was them being cut?

A. Yes, sir.

Q. Did you make any memoranda as to the particular individual cows that aborted?

A. No, sir.

Q. Did you trace them after that?

A. No, sir.

Q. See how they got along?

A. I saw them come back to serve again.

Q. When?

A. In the course of three weeks, or such a matter.

Q. How long was it after landing at Estill that thirty of these cattle were taken to Kansas City for sale?

A. In October.

Q. You mean some had been served with the bull before they had been taken?

A. I don't think there was but one or two; there was but one taken up there.

Q. Thirty were taken to Kansas City?

A. All but three of them sold.

Q. Not having made any memorandum showing the cows that had aborted, can you say whether or not any of these four or five or six cows that had aborted were in the thirty?

A. Our main object in making the sale was to breed cows

269 not in calf.

Q. The question is this: Not having taken any means to identify the cows that had aborted, whether you know as a matter of fact whether any or all of these aborted cows were not taken to Kansas City?

A. I know there was one taken.

Q. Which one was that?

A. Kingsbury's.

Q. Heather-bell?

A. Yes, sir.

Q. You say that was the only one?

A. Yes, sir.

Q. You are sure of that?

A. That is my recollection.

Q. That was one of the four or five that had aborted in the field?
A. No, sir.
Q. That was the only one of the lot taken to Kansas City?
A. You ask——
Q. If any of the cows that aborted in the field after they arrived at Estill were in the lot sent to Kansas City?
A. I beg pardon. I must have misunderstood you. There was none of them.
Q. How do you know?
A. Because I know they were not put in the stable and got ready.
Q. When were your cattle taken from the field?
A. In about ten days after they were landed.
Q. Where were they taken then?
A. On my farm—put in the barn.
Q. All put in the barn?
A. No.
Q. How many of the thirty that were taken to Kansas City?
A. Including the bulls?
Q. You yourself had nothing to do with the separation of those cows that were put in the barn and those that were left outside?
A. Yes, sir; I had my portion.
270 Q. Had they been separated between you and your brother?
A. Before they were taken to the barn?
Q. Yes.
A. I think not.
Q. They were not separated till after the sale at Kansas City?
A. Really I don't remember about it. I could not say positively.
Q. How do you know none of those cows that aborted in the field were put in the barn?
A. I know it by personal observation.

William M. Marshall.

WILLIAM M. MARSHALL, sworn on the behalf of plaintiffs, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. Where do you reside?
A. In Howard county.
Q. How far from Mr. Estell and Mr. Elliott?
A. About ten miles.
Q. What is your business?
A. Farmer.
Q. How long have you been a farmer?
A. About twenty years.
Q. Have you any other business in connection with farming?
A. Stock-raising.
Q. How long have you been raising stock?
A. About the same length of time.

Q. To what extent have you been dealing in stock and handling it?

A. I generally keep about one hundred of cattle on hand.

Q. Were you acquainted with the value of stock in Howard county in 1883?

A. Yes, sir.

Q. Did you examine the Estell & Elliott shipment at Estill?

271 A. Yes, sir; I helped to unload it.

Q. State how you examined them—with what particularity.

A. Me and Mr. Nance examined them there as they were taken off. Four colored men brought them off one at the time, off the train into the stock yard. We examined them one at a time to see whether they were damaged or what condition they were in.

Q. Who was with you at the time?

A. Mr. Nance and Mr. Tutt.

Q. Were either of the plaintiffs there present assisting in the examination?

A. No, sir.

Q. I will ask you what condition the entire shipment was in. Just state generally to the jury.

A. They looked very bad.

Q. In what way were they bad?

A. Jammed. They seemed to be bunged up—lame; very bad condition.

Q. Have you shipped cattle often yourself or do you know much about shipments of cattle?

A. I have shipped some. I have not shipped a great deal. I have seen a great deal of it shipped.

Q. Did you make a memorandum of your examination, Mr. Marshal?

A. All three of us did; each made a separate memorandum.

Q. I will get you to look at that paper and see whether that is a correct statement of what you brought down at that time.

(Paper shown to witness.)

272 Mr. POLLARD: We object to his stating from the paper.

Mr. WILLIAMS: We use it to refresh his memory.

Mr. POLLARD: We are entitled to see what he can remember before he does it.

The COURT: Let me see it. (To witness:) When was this made?

A. At the time we examined them.

Mr. WERNER: This particular paper?

A. No; not that particular paper. We each of us made a memorandum. I presume that is an agreement of all three of our memorandums written down afterwards on the same day.

(By Mr. WERNER:)

Q. That is not your writing?

A. No; it is not.

(By the COURT:)

Q. When was this made with reference to the examination which you made of the cattle?

A. The same day. My recollection is that we went to work, each kept a memorandum, then we compared our memorandums. We were some time coming to an agreement as to the value; we finally agreed. I presume that is the final conclusion of the whole. I know we confided it to writing at the time.

Mr. POLLARD: You compared your notes together?

A. We did.

Q. Then you agreed on a basis?

A. Yes, sir.

Mr. WILLIAMS: You made a statement—that is, a copy of it?

A. I have not looked over it.

Mr. WILLIAMS: You made this statement for the purpose of having it presented to the railroad company, did you?

A. Yes.

273 Q. As a basis for a settlement?

A. That was my understanding of what we were doing—that the railroad company would be there the next day to adjust this matter—their representatives.

The COURT (to Mr. Williams): What do you want to show?

Mr. WILLIAMS: I merely want to give him this paper to refresh his memory and ask about those cattle; then ask him the difference in value between the animals in the condition in which they ought to have arrived and the condition in which they did arrive, whether these figures represented his judgment at the time of that matter. I don't claim that the paper itself is evidence.

Mr. POLLARD: He never saw those cattle before, on his own testimony; it appears he and these two gentlemen examined these cattle separately; they compared their notes, came together and made a certain memorandum. Whether he made it or somebody else made it don't appear; he don't say he made it. In any event, I say we are first entitled to what he knows about it, independent of memorandum. If he cannot remember anything about it, and this is a memorandum he made of his own estimate, or as showing the injuries he found to that stock, he might refresh his recollection by it.

The COURT: Let us see what facts he recollects, Mr. Wil-
274 liams, of his own knowledge before you show him that memorandum.

Mr. WILLIAMS: Mr. Marshall, state how you examined the cattle.

A. We made this examination, all three of us together; there was no separate examination made by either of us as I know of, and I recollect one of the bulls was brought off——

Mr. WILLIAMS: Wait. Then after you made memorandums separately you came together — agreed upon a statement to be presented to the plaintiff?

A. To the railroad company.

Q. That was the final agreement?

A. Yes, sir.

Q. After consulting you came to that conclusion?

A. Yes, sir.

Q. I will ask if any of the cows you saw there had aborted their calves; if so, how many.

Mr. POLLARD: I don't think that proper.

Mr. WILLIAMS: If you could tell from the indications.

Mr. POLLARD: That is improper. Let him state the condition of the cows.

The COURT: It depends on the source from whence he derives his knowledge. If he speaks merely from reports given to him at the time by those who had charge of the cattle, that is not competent; if he formed an opinion from any signs which he himself saw, which enabled him to speak, he can answer the question.

Mr. WERNER: The objection to the question put was it was leading.

275 Mr. POLLARD: I think the proper way is to let him state the condition of the cattle.

The COURT: Can you state any more fully than you have stated, now, from recollection the condition those cattle or any of them were in?

A. I certainly can.

Q. Sir?

A. I can.

The COURT: Go ahead. State as fully as you can.

A. To the best of my recollection there were five or six cows that I would pronounce had lost their calves at the time they were taken off the cars.

Mr. WILLIAMS: How did you know?

A. I judged from the membrane or after-birth that was hanging to them—their condition.

Q. What else?

A. My recollection of the bulls was that there were three of them in very bad fix. One of them—his testicles was badly swollen—bruised. Two of them they could not hardly get off the train. They were assisted by four hands. They seemed to be broken down in the loins. They just dragged their hind parts.

Q. What else do you remember specially? Do you remember any special injury to the cows?

A. Yes, sir; I remember one cow with an eye knocked out. I don't know whether it was entirely out or not. It seemed to be blind of one eye—bruised about the side of the head.

Q. Do you remember any lame ones?

276 A. There was a calf. I cannot recollect whether it was a bull calf or a heifer calf. I pronounced her leg was broken—bruised in a good many places—very badly bruised up—used up.

The COURT: The last one you mentioned was one calf?

A. One calf about six or eight months old, I would judge.

Mr. WILLIAMS: You can state if you saw anything the matter with these cows or heifers that had lost their calves aside from the

fact they had lost their calves. What was their appearance outside? Do you know anything special with reference to that?

A. To the best of my recollection now there were about 15 of the cows that looked very hollow-eyed—very hollow; looked in very bad condition.

Q. Fifteen of them?

A. Yes, sir—that is, cows and heifers.

Q. Did you notice any of them bruised in any way specially?

A. There were several of them skinned up about the hip-bone and places. I cannot recollect now exactly how many.

Q. Do you know of any of them being hurt about the neck?

Counsel for defendant objects.

The COURT: He may answer the question.

Defendant excepts to the ruling of the court.

A. I don't recollect any.

Q. You don't remember?

A. No, sir.

277 Q Do you remember any other special injury to any of the cattle that you can recall to your recollection independent of the paper—anything else?

A. Any one?

Q. Yes.

A. No, sir. I can recollect generally.

Q. What was the general condition of the entire lot of cattle?

A. I think there were about half of them in just the very worst condition.

Q. What do you mean by the "worst condition"?

A. Half of them bruised up. I think that is what we arrived at that day.

Mr. POLLARD: We want to know what you recollect.

Mr. WILLIAMS: Bruised up in what way?

A. They looked like they had been jammed up some way.

Q. How did that affect the market value—as you say, bruised up, jammed up?

Mr. POLLARD: We object. He never saw the cattle before; don't know anything about their habits.

The COURT: He has given his general recollection, I understand; all he can state from memory as to the condition of the cattle. I think now they are entitled to show him that paper and call his attention to particular cattle and have him testify as to the condition of particular cattle.

Mr. POLLARD: I understand that was not made by him.

The COURT: It is not necessary in every case that a memo-

278 randum should be made by a man with his own hand to enable him to testify from it. The rule is that he can testify from a memorandum made by himself; another rule is that a witness may refresh his memory from a paper which he has seen if he recollects that at the time he saw it he knew the matters stated in it were correct. I think this paper comes within the last rule. Here

is a paper which he says was made at the time the cattle were examined. It is not in his own handwriting. However, it represents the condition of particular animals as he then saw them. I think he can use the paper.

Mr. POLLARD: I don't understand him to say that. I don't understand him to say he knows that to have been made then or that he saw this paper at that time.

The COURT: You can ask him further questions on that point.

Mr. POLLARD (to witness): How is that? See if you can tell who wrote that out—whether you are able to testify you saw that particular paper at that time.

A. I stated here we each of us made a memorandum.

Q. I am not asking about that. I ask you whether you know who wrote this particular paper, not one like it?

A. I think Mr. Tutt wrote the paper.

Q. Who is Mr. Tutt?

279 A. He is one of the three who made the examination of the cattle.

Q. Was it written there?

A. Yes, sir.

Q. That is in his handwriting?

A. I think it is; I won't be positive; I am not familiar with his writing.

Q. Are you able to say you saw that particular paper at the time you appraised the cattle?

A. I either seen this paper or one similar to it.

Q. One similar to it?

A. Yes.

Q. Can you say whether you saw that one?

A. I am not well enough acquainted with Mr. Tutt's handwriting to say this is his handwriting.

Q. I ask you, from your recollection, independent of the handwriting, whether you are able to say when you made the examination you saw that paper.

A. Yes; I think we did, and we agreed to it.

Q. I am asking whether you are satisfied you saw it.

A. I am satisfied——

Mr. POLLARD: Did you put these numbers on it?

A. I think we had the numbers, and we agreed on those prices, and they were put down here.

The COURT: The point is this, Mr. Marshall: Can you identify that paper now as being a paper that you saw at the time this examination was made, and did you know at that time that it represented correctly the condition the cattle were in?

280 Mr. WILLIAMS: They have the original.

WITNESS: I don't recognize the writing.

The COURT: If you have the original——

WITNESS: All three of us signed it at the time.

Mr. WILLIAMS: They have got it.

Mr. POLLARD: If we have the original——

(Counsel proceeds to examine papers.)

Mr. WILLIAMS: While they are looking for it I would like to ask Mr. Marshall this question: If you examined this paper here, and if you can remember that paper contains a correct statement—this paper in your hands—have you looked over that particular paper?

A. This one?

Q. Yes.

A. Never did.

Q. Have you not examined that paper?

A. No.

Q. Before this morning?

A. Yes, sir.

Q. Didn't you examine it at Kansas City?

Mr. POLLARD: We have not got the original.

Mr. WILLIAMS: You had it at Kansas City?

Mr. POLLARD: No; we didn't have it at Kansas City.

WITNESS: We all three of us signed it. I certainly would recognize it by my own signature.

Mr. WILLIAMS: That is the only one we have.

The COURT: Go on with something else.

(By Mr. WILLIAMS:)

Q. What was your judgment, independent of any paper—what were these bulls worth? What was their market value, these three you say were broken down in the loins, at the time they ar-
281 rived at Estill. Just from recollection now, — what they were worth.

Mr. POLLARD: We object.

The COURT: That is, you mean to ask what was the depreciation in their market value by reason of the injuries which he observed.

Mr. WILLIAMS: My purpose is to show what they were worth in the condition they arrived. I would as soon ask it the other way.

The COURT: I want to understand the meaning of your question.

Mr. WILLIAMS: The purpose is to ask what they were worth in the condition they arrived at Estill, with the view of fixing what the damage to them was.

The COURT: You may answer that question.

Mr. POLLARD: That is the very question we object to. He never saw the cattle before. It is allowing him to assess the damages, which, we say, is a question for the jury. We insist all it is competent for him to do is to state the nature of the injuries and the condition of these cattle as they came off the train.

The COURT: I don't think that objection is tenable. A party observes certain physical injuries; he is asked what the value of the animal was without those injuries and what the value of the animal was in its injured condition. It is, of course, incumbent on the plaintiff to show that whatever injury the witness saw was occasioned by some fault of the defendant. It is not necessary, how-
282 ever, that they should establish it by this particular witness.

Mr. POLLARD: I don't claim that. I claim it is not com-

petent for him to state the value of the injuries or the amount of the injuries; that is for the jury.

The COURT: I will overrule your objection.

Counsel for defendant then and there duly excepted to the ruling of the court.

Q. What, in your judgment, were these animals worth in the condition you saw them at Estill at the time they arrived?

A. Those three bulls, you ask me?

Q. Yes.

A. They were worth comparatively nothing.

Q. Have you any knowledge as to their value?

The COURT: Give us your opinion.

A. My opinion would be they would be worth nothing. I am honest in it. They were very hollow; they didn't appear to be fit for service—not fit for beef. Ten or fifteen or 20 dollars would be a fair value.

Q. What would they have been worth had they arrived in good order and condition?

Counsel for defendant object.

The COURT: You may answer.

Defendant excepts to the ruling.

A. From $500 to $600 is what they were selling at.

Mr. WILLIAMS: You mean each one?

A. Each one; yes.

283 Q. The remainder of the herd you didn't see any visible physical injury to. You say — were jammed up and injured in that way. I will ask you to state to the jury, if you can, the depreciation in the value of those animals on account of the condition in which they arrived there.

Counsel for defendant object.

(Mr. POLLARD:) He can tell what the value of these bulls was, because they bore external signs of injury; because it might be established by other evidence that the external injuries were caused by the collision. Now, he asks as to the value of the balance of the herd when they arrived at Estill. Now, their condition when they arrived there was due as well to the long journey of a thousand to fifteen hundred miles tossing about in the cars, jolting, and so on, as well as to any injuries——

The COURT: I think that objection is well made. Wherever the witness can recall an animal that was injured and state the nature of the injury, I will allow him to state to what extent such injury depreciated the value of the animal. But (to put the question in that sweeping form) I think is improper.

Mr. WILLIAMS: I want to ask him this: These animals that were jammed up, he spoke of as being jammed up, stiff, and sore. I will ask whether that stiffness and soreness affected the market

284 value of the animals at that time.

A. It certainly did.

Q. I will ask you what, in your judgment, was the difference in the value of the animals if they had arrived in good order and condition and in the condition that they were, jammed up, as they did arrive.

Mr. POLLARD: I object for the same reasons.

The COURT (to witness): Do you recollect any particular animals or number of animals now that you can say were lame?

A. To the best of my recollection now there were half that were lame and stiffened up; could not hardly untrack themselves.

Mr. WILLIAMS: Your honor remembers other witnesses testified there was no other accident, and other witnesses testified an ordinary railroad journey wouldn't stiffen them.

Mr. POLLARD: We think there must be some animal—under your honor's instruction, which I think is liberal—there must be some particular animal pointed out. He cannot go on and assess damages on that herd in a general way. He has got to point out some injuries. I don't think it is sufficient to go on and say, "Here is a lot of animals that were stiff and they were damaged one-half their value or one-quarter their value." That is simply giving a conclusion which is based on nothing. It is virtually assessing the damages by this witness.

285 (The last question by Mr. Williams was read.)
The court sustained the objection.

Mr. WILLIAMS: What do you say about the fifteen head?

A. Cows and heifers.

Mr. WILLIAMS: What, in your judgment, would these jammed-up animals—the half you say were jammed up and stiffened and lame—what, in your judgment, would they have been worth had they arrived at Estill in good order and condition?

Mr. POLLARD: We object.

The COURT: That is substantially the same question as the other; I sustain the objection.

Mr. WILLIAMS: Your honor sustains the objection on the ground of the generality of the question?

The COURT: Yes; & because specific injuries are not described.

Cross-Ex.

Cross-examination by Mr. POLLARD, for defendant:

Q. Your examination of these cattle was made immediately on their arrival?

A. Yes, sir.

Q. At Estill from their journey from Boston, wherever they came from?

A. Yes, sir; wherever they came from; I didn't know at the time.

Q. As they came out of the cars?
A. Yes, sir.
Q. They were taken from the cars and put into a lot or pasture?
A. Lots, stock-pens.
Q. You and Mr. Nance and Mr. Tutt were there for the purpose of making an examination?
A. Yes, sir.
Q. At the request of Estill and Elliott?
286 A. That is something I could not tell you; I believe I just happened in Estill at that time; I could not tell whether it was Mr. Estill or Mr. Elliott asked me to assist Mr. Nance; it was one of the two gentlemen.
Q. You were there at their request for the purpose of examining these cattle, were you not?
A. I don't recollect that; I don't think I went there for that purpose; I often go there to take the train to go to Fayette.
Q. Don't you know whether you went there at their request for this purpose or not?
A. I don't recollect.
Q. How far do you live from Estill and Elliott?
A. About ten miles, I think.
Q. You were well acquainted with them all?
A. Very well acquainted with all of them.
Q. Do you know what you were over there in their place for that day?
A. It is not their place; it is the depot.
Q. It is right there at their place?
A. Yes, sir; their place comes up to the depot and station.
Q. Had you any other business than this there that day?
A. I don't recollect whether I had or not; I cannot recollect.
Q. You have no recollection about it; whether you went there on some other business or went there accidentally or went there at their request, have you?
A. I wouldn't have went there accidentally; I would have
287 went either on some other business or their request.
Q. You are unable to tell which?
A. I cannot recollect whether I had notice of the fact or went there by reason of something else; I cannot recollect that.
Q. You made the examination at their request?
A. I did, sir.
Q. Who was there present when this was made?
A. When the request was made?
Q. When the examination was made.
A. Nobody but me, Mr. Tutt, and Mr. Nance; and there were four colored men bringing stock out of the car to us.
Q. Do you remember who asked you to make the examination?
A. No, sir; I don't know whether it was Mr. Elliott or Mr. Estill.
Q. Did you find Mr. Tutt and Mr. Nance there?
A. I think Mr. Nance came there after I did, a short time after I did; Mr. Tutt lives there.

Q. Did you have any conversation with Mr. Elliott or Mr. Estill about the cattle?

A. Previous to the examination?

Q. Or during it?

A. Not a word.

Q. Did you know it was claimed they had been in a wreck?

A. No, sir; not a word about it at all; I didn't know they even had made an importation of cattle until that time, that day.

Q. What did you understand you were making the examination for?

288 A. They said they had a lot of cattle that were damaged in Ohio in a wreck; they wanted us to be very particular.

Q. They told you the cattle had been in a wreck?

A. Yes, sir; I will tell you exactly what they told me.

Q. I don't want you to tell a story about it; I want your answers to be responsive to me questions. They told you the cattle had been in a wreck when they asked you to examine them.

A. I will——

The COURT: You can answer that question "yes" or "no," whether they told you the cattle had been in a wreck.

A. They did, sir.

Q. You understood, or they told you, that examination was for the purpose of ascertaining the damages sustained by the cattle in that wreck?

A. They did; for the purpose of making a settlement with the railroad the next day.

Q. I didn't ask that. They told you it was for the purpose of making an examination of the cattle to ascertain the damages sustained in the wreck?

A. Yes, sir; the damages the cattle had received in a wreck in Ohio somewhere.

Q. Now, where Mr. Estill or Mr. Elliott there during the examination?

A. Neither of them; didn't see neither of them.

Q. Did you see them after?

289 A. No, sir; I went home; we didn't get through till about dusk.

Q. How long were you engaged in making the examination?

A. I think about 1 to 5 or half after 5.

Q. Have you ever seen the cattle since?

A. Never have to my opinion; I am satisfied I never did.

Q. Now, I want you to specify, as nearly as you are able, the nature and character of the injuries to these three bulls you have testified about.

A. Well, one of them was very stiff; could not scarcely walk, and his testicles were very badly bruised and swollen. He could not hardly untrack himself.

Q. Where was he bruised?

A. His testicles were bruised.

Q. Was there any other bruise about him?

A. I don't think there was perceptible.

Q. What other injury but that to the testicles did you observe?
A. On that bull?
Q. Yes.
A. None I know of except stiffness. He could hardly walk.
Q. Were they taken out of the cars onto the platform?
A. Yes, sir.
Q. How far down was the ground from the car?
A. The usual stock-pens.
Q. I don't ask about the usual stock-pens, but about that pen.
A. I would judge about 4 and a half to 5 feet; 4½ feet, I would judge, would be right.
Q. They were taken down an incline?
A. Yes, sir.
290 Q. Led down?
A. Yes, sir.
Q. After he got down on the ground could he walk around?
A. He could not walk enough. We tied all the bulls, as we took them off, to the fence; those three that were damaged we turned them loose; we didn't think it worth while to tie them; they stayed there.
Q. Turned them loose where; in the yard or where?
A. Right there.
Q. How large a yard was it?
A. The stock-pen?
Q. How large?
A. About a quarter of an acre—about; maybe half an acre in all; there were two or three pens—I think two pens; we put the cattle in different lots.
Q. Did you put the bulls in one and the cows in another?
A. You mean those injured bulls?
Q. All the bulls.
A. The bulls that were not much the matter with we had tied them to the fence.
Q. Did you tie all but the three?
A. I think we did.
Q. These three were led down from the platform?
A. Yes, sir.
Q. They were left to go loose; they were not tied up?
A. Wherever we left them they remained. They were there when I left at night.
Q. You didn't see them move?
A. No, sir.
291 Q. Do you know the name of this one that was injured in the testicles?
A. No, sir.
Q. Didn't they give you the names of the cattle?
A. No, sir; not that I recollect.
Q. Didn't they give you the numbers?
A. The numbers were called out.
Q. Who by?

A. I don't recollect. I think there were numbers on the ear. I recollect looking at them, examining them, when they came out.

Q. You recollect looking at the number in the ear?

A. The ear, I think, sir.

Q. What was the mark on the ear?

A. I think there were tags fastened to the ear.

Q. The number of the animal on it?

A. Yes, sir; that is my recollection.

Q. Do you remember the number of that animal?

A. No, sir.

Q. Take the next one of the three that were injured.

A. They were both very similar; they seemed to be broken down in the back, and could just barely drag themselves.

Q. Was there any mark or breaking of the skin on them?

A. There seemed to be bruises about the hips.

Q. You can tell whether there was anything—did you discover any flesh wounds on them or either of them?

A. I don't recollect that.

Q. You cannot remember, then?

A. No; I cannot.

Q. Can you remember anything that appeared to be wrong
292 about them, but, as you have said, they seemed to be weak in the back?

A. No, sir; I don't recollect anything wrong besides they were not good.

Q. They were weak in the back. You didn't discover anything else?

A. No; didn't discover anything else.

Q. How many other bulls were there?

A. I don't know that, sir. I cannot recollect how many bulls were there in all.

Q. Can you give an idea or can you specify any injuries to the other bulls?

A. No, sir; I cannot now.

Q. They were all tied up to the fence?

A. There were several of them very stiff, but by urging they would walk up, and apparently you could see whether there was anything wrong with the back. They seemed to be stove up some.

Q. So far as you could discover it was nothing but stiffness?

A. Nothing but stiffness as far as we could discover.

Q. How far were they taken—those that were tied—from the car to the place you tied them?

A. Probably 50 or 60 yards. They were in a separate lot.

Q. It was sixty yards from the place you took them from the car to the place where you tied them?

A. I don't know whether it was that far. I don't know whether the lot was over a quarter of an acre. I think where those
293 bulls were put was adjacent to the lot we were unloading—a short distance.

Q. Did you make your inspection as they came from the car?

A. Yes, sir; as they came out of the car; we stopped them after

they got off the chute onto level ground; we examined them, walked them round to see what their condition was. I am not an expert.

Q. You are not an expert?

A. No, sir.

Q. After you had inspected the lot tied up you inspected the next one. That is the way the work was done?

A. Yes, sir.

Q. How long were you engaged in the actual inspection of the cattle independent of comparing your notes?

A. I think we began about one o'clock and about half after five we got through.

Q. Got through what?

A. With all of them.

Q. What I want to know is how long you were inspecting and making your report?

A. I don't think it took us over three-quarters of an hour to make the report; the balance of the time was spent in examining the cattle, taking them off; half an hour or three-quarters.

Q. That closes the bulls, I believe. You never saw the cattle after—you don't know what became of them after that?

A. No, sir.

Q. Please state what injuries you discovered to the cows and heifers.

294 A. I stated heretofore there were five or six, I believe it was six, that I pronounced in my judgment had lost their calves.

Q. That was from your inspection?

A. I don't know where at.

Q. That was from the appearance of the animals?

A. From signs that never fail me.

Q. From the appearance of the animals?

A. Yes, sir.

Q. What as to the other cows?

A. Well, in addition to those six, I would say there were about fifteen of them looked very hollow-eyed; looked — they had undergone suffering—that is, heifers and cows, in addition to those six.

Q. You thought were aborted?

A. Yes, sir.

Q. You didn't discover any injury about those?

A. I cannot cite you to any particular ones. They were bruised.

Q. Describe the bruises.

A. I cannot. I cannot locate the bruises now, it has been so long.

Q. Were there any flesh wounds on them?

A. I think there were on some of them.

Q. Whereabouts?

A. I cannot locate that, to be correct about it.

Q. Can you tell how many?

A. No; I could not say that. I think there were about fifteen that were in very bad condition.

Q. I don't care about your repeating "bad condition." I
295 want you to point out in what that consisted.

A. They were hollow-eyed; the eyes seemed to be resting back in the head like they had underwent terrible suffering; I judged them like I would judge my own cattle at home.

Q. I want you to describe the cattle; you say they were hollow-eyed?

A. Yes, sir.

Q. What else was there about them?

A. They were very drawn and lank, no life about them; you could not hardly untrack them.

Q. Did they move?

A. They moved round.

Q. They were not lame, were they?

A. I think some were lame.

Q. In what way?

A. I could not tell you. I could not particularly say in what way they were stiff, that was lame.

Q. They were all led across and tied?

A. No, they were not tied; we put the cows all to themselves.

Q. Loose in a lot?

A. Yes, sir.

Q. How far were they taken?

A. They remained in the lot where we inspected.

Q. With the bulls?

A. I don't know whether we kept the bulls in that lot—I think we kept the bulls in one lot and put the cows in an adjoining lot.

Q. You had never seen these cattle before?

A. Never had, no.

Q. Had you ever had any experience with that kind of cattle before?

A. Never.

Q. Did you ever own any of them?

296 A. Never have yet.

Q. How do you know their market value?

A. By reading newspapers, stock journals, seeing the prices of polled Angus and Galloways.

Q. Your whole information is derived from reports?

A. Yes, sir; from reports, not from any experience with them.

Q. You testified as to the market value of the cattle, didn't you?

A. Sir?

Q. You fixed a price on the cattle, you testified as to their market value in your testimony?

The COURT: Yes, he did, as to the three bulls; not the cattle generally.

(Mr. POLLARD:)

Q. As to the three bulls, your only information as to the market value was derived from newspaper accounts?

A. If you want, I will give you something else that is personal

experience. I have tried several times to buy a calf—a polled Angus calf.

Q. That would not be evidence of the bulls?

A. Yes, sir; a bull calf—calf standing by its mother's side; I learned what they would take for it; I have come to the price that way, what a calf would be worth standing by its mother's side.

Q. That was before this time?

A. Yes.

Q. What sales have you ever read of?

A. Kansas City and Chicago.

Q. When was the Kansas City sale?

A. I cannot recollect now; several of them.

297 Q. In that year?

A. I don't recollect that, whether it was that year or not.

Q. You don't know anything about the character of the cattle that were sold at those sales, whether they were like these?

A. Yes; they are known by the family; polled Angus, Galloways, short horns.

Q. Do you mean they are all alike?

A. No, sir.

Q. You don't know whether these cattle were better or worse than those cattle?

A. No, sir; but one family. The polled Angus ranged the highest and Galloways higher than short horns.

Q. Some individuals ranged higher than others?

A. Yes, sir; there are favorites amongst them that run up high.

Q. In making your comparison of the value of these cattle, the value of these cattle with the cattle you read about, you don't know whether these cattle were better or poorer than those you saw reported in the paper?

A. No, sir; I base my judgment upon the sale of imported cattle.

Q. Generally?

A. Yes, sir; what they brought on the market after they were brought here and put on the market in good condition. I arrived at an estimate, if these were in good condition, what they would probably bring.

Q. Did you ever own any of these cattle?

A. No; I never did; never owned one.

Redirect.

Redirect examination by Mr. WILLIAMS, for plaintiffs:

298 Q. You live within ten miles of where these cattle are being sold—Estell and Elliott's?

A. Yes, sir.

Q. How far from Mount Leonard?

A. From Mount Leonard?

Q. Yes.

A. 20 miles.

Q. That was the headquarters for black cattle in that part of the State?

A. Yes, sir; for all Central Missouri.

Q. How were those cattle brought off? Were they brought off together?

A. One at a time.

Q. How did you examine them?

A. We examined them one at a time after we got them on level ground.

Benjamin E. Nance.

BENJAMIN E. NANCE, sworn on the part of the plaintiffs, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. Where do you reside?

A. Franklin township, Howard county.

Q. How long have you lived there?

A. Going on thirty-four years.

Q. What is your business?

A. I am a farmer and stock-raiser—dealer.

Q. State to what extent you have been dealing in stock—how long.

A. I have been dealing in stock twenty-five years; pretty largely.

Q. You are about the most extensive dealer in that country, are you not?

A. Yes; I expect I handle as much stock as any man in
299 Howard county; probably more.

Q. How long do you say you have been at it?

A. Twenty-five years.

Q. What experience have you had in shipping stock by rail?

A. I have been at it ever since they had any railroads. I shipped them by river before.

Q. What experience, if any, have you had in shipping cows and calves?

A. I shipped all kinds of stock.

Q. I will ask you to state whether, in your opinion, based upon your experience as a shipper, an ordinary journey by rail is sufficient of itself to produce abortions in cows.

A. Well, I have shipped a great many of them to St. Louis and Chicago, and never had one abort.

Q. I ask you whether, in your opinion, it is sufficient in itself.

A. I should think if they got any hurt——

Q. I don't ask that. I am asking as to any ordinary journey.

A. No; I don't think it would; an ordinary journey.

Q. I will ask you if you are acquainted with the value of black cattle and other cattle in that vicinity.

A. I reckon I am, as much as an ordinary man. Some men that follow it largely know more about it than I do; men that know different qualities, different grades of them better than I do. Where I see one I reckon I know about as much as any of them.

300 Q. I will ask you in what the principal value of black cattle consisted.

A. There are different grades of them.

Q. For what purpose are they principally valued?

A. They are valuable on this account: We want to get in a better stock of cattle.

Q. What are they imported for?

A. They are imported for breeders; they are imported for breeders. In our country the bigger the breeder and the better the quality of the cattle the higher the price.

Q. Do you know the difference in the market value between a cow with calf and a cow that has aborted its calf in 1883 in Howard county?

Counsel for defendant objects.

The COURT: You may answer.

A. I will state right here I have had a good deal of experience in that.

The COURT: Answer the question directly.

A. Yes, sir; I think I do.

Q. What was the difference?

Mr. POLLARD: We object on the ground he is not competent.

Q. Suppose you give us your opinion of the difference in the value in dollars and cents, without any explanation.

A. If a cow weighed 1,200 pounds, at four cents it is $48; if she is not a breeder she is just worth what that quality of cattle
301 bring. As a breeder she is worth no more than she would be at the stall, and hardly as much. She has to go to the butcher's block.

Q. That is, you say, after she has aborted a calf?

A. Yes, sir; that is my rule.

Q. After she has aborted her calf you didn't state what the value was.

A. Just what she is worth for the butcher's block—for beef.

Q. Did you see these black cattle—Estell and Elliott's black cattle?

A. If you will give me a few minutes' time I will tell you all I know about that.

Q. I will ask the other, then I will come to that. Did you see these cattle—the Estell and Elliott cattle?

A. I will tell you all about it if you will give me two or three minutes' time.

Q. Go ahead.

A. About the 20th or 21st or 22nd—somewhere along there; it was a right busy time—I was sowing a great deal of wheat; I was in the field sowing when Mr. Estell sent a colored boy to my house. They sent the boy to the barn—I was out of my barn—with a note requesting me to come right up with the boy, and urging that I should come. I told the boy to go on back and tell Mr. Estell I would be there as soon as I could give some directions about my

place, which I did to the foreman, as to what to do. I got
302 my buggy and drove up there. When I got there Mr. Estell told me that their cattle that they were importing had been in a wreck and wanted me to appraise them with some other parties; that there would be some railroad men there. He wanted to settle on the damages for his cattle with the railroad men. We got there two or three hours before the cattle came; probably three hours I was there. When I got there Mr. Marshal was there at the depot—that is, the depot stock yards at Estill station blacksmith shop. When the cattle pulled in there were no railroad men. Mr. Estell—young Estell—told me they wanted me to take charge of it and take the cattle off. They gave us a good force of colored men. There was a man there with a book, where the numbers of the cattle and so on—the numbers of the cattle—were, and the cars were set on the side track, and the engine went on and left the cattle and the men took them off one by one. We tied the bulls to the fence. They were examined one at a time. There were four lots. We appraised—assessed—the damages, as we thought, to each animal—me and Mr. Marshal, and the third gentleman, Mr. Tutt—but
303 he had very little to say. He just sort of split between us when we were too far apart. The worst of the cattle we put down; we had a little book to put it down; we assessed the damages to each one. If we were too far apart the other man split in between us. The worst of them we put in a lot to themselves. The best we put in another lot, and when we got through with all of it we went back to the worst. We had them return, march back down the lot one at a time, and went over them as carefully as we could.

Q. In your opinion what would the average heifers in that lot have been worth if they had arrived in good order and condition?

A. There was a difference in the price of the cattle, according to the grade of that cattle; but they all sold very high at that time. There was very few of them cattle that was in proper condition. Some were sore and lame behind, some before; just everything jammed up.

Q. Did you notice anything about any of the cattle—anything particularly wrong in regard to any cattle? If so, state what.

304 A. There was one bull with the testicles swollen very much.

Q. Did you notice anything else wrong about it?

A. It seemed to be jammed up and sore—could hardly get about.

Q. State to the jury what, in your opinion, that bull was worth in its condition at the time you saw him at Estill—in the condition you did see him.

A. There was no sale for him in that condition.

Q. What was his market value as he was?

A. Worth no more than he would have brought to make Boulogne sausages.

Q. What would he have brought to make Boulogne sausages?

A. Two and a half cents to three cents.

Q. How much did he weigh?

A. I suppose that bull would weigh about fourteen hundred pounds.

Q. What would he have been worth if he had arrived there in good order and condition?

A. I should think he would not have been worth less than five hundred dollars—probably eight.

Q. Take the next one.

A. Then there were two other bulls that seemed to be hurt in the back or loins somewhere. The colored men helped them out from the cars by a little shoving. They wabbled behind; they
305 wabbled round at the back. I cannot say whether it was right in the loins or round; that is my idea; that was the condition the two bulls were in.

Q. Were they in a condition to serve cows or not?

A. O, no; they could not serve any cows. If you let them alone they just dropped right down. This black man had to hold them up behind.

Q. These two bulls, in the condition in which they were at the time you saw them at Estill what were they worth—the two you talked about last?

A. The last two bulls—I wouldn't know what they would be.

Q. Did they have any value at all?

A. They would not fetch nothing if on the St. Louis market. If I had them there they wouldn't give me nothing for them.

Q. What were they worth at Estill for breeders?

A. They were not worth anything right in that condition. I don't know whether they ever got well. I know one didn't get well, for I saw him after.

Q. What would those bulls have been worth had they arrived at Estill in good order and condition?

A. They would not have been worth less than $500 apiece.

Q. Was there any other bull there you noticed specially?

A. Yes; there were several other bulls there that were lame.

306 Q. How many of them do you remember?

A. I don't recollect how many. I went over it; made no note of it at all.

Q. Do you remember any other specially besides these three?

A. There was a calf that had a leg broken.

Q. I mean of the bulls.

A. No, sir. There were several of the bulls lame; some bruised.

Q. Can you, from your present recollection of those or any other bulls, state the difference between their value?

A. No, sir; there were so many of them. It has been a very long time ago.

Q. I understand that.

A. I have had a great deal of my own business to attend to.

Q. In regard to those cows, Mr. Nance, or heifers, what evidence did you see in regard to injury to them, if any?

A. There were five cows we were of the opinion had aborted. I think very likely there were six. I gave it only as five. I think probably there were six. There were five or six of them.

Q. How did you arrive at the conclusion they had?

A. That is very easy to tell for a man who has been with them all his life.

Q. What signs were there?

A. The external signs of that were stringy and dripping.

307 Q. There could not be any mistake about that?

A. No; no mistake about that.

Q. What were those cows worth in the condition in which you saw them at Estill in the fall of 1883?

A. Just what they would have brought on the butcher's block.

Q. What would they have brought on the butcher's block in their then condition?

A. If they had been fat——

Mr. WILLIAMS: No; I mean in the condition they were in then.

A. They would not have brought over three cents.

Q. How much did they weigh?

A. I don't know.

Q. Give your best judgment.

A. They were three-year-old heifers, two years and three years old.

Q. Would they weigh eight hundred to a thousand pounds?

A. Yes; they would weigh a thousand pounds; somewhere from a thousand to twelve hundred they weighed, according to their looks.

Q. What would they have been worth if they had arrived there in good order and condition?

A. I could not say exactly; you can take the sales.

Q. If you know the market value, about what would it have been?

A. I suppose those cows would fetch right $500 apiece.

308 Q. You spoke about a calf that was hurt?

A. There was a calf—I don't know how old, certainly he was not less than four months old; he might have been over; he was a very likely calf—that had his leg broken.

Q. That was more than four months old?

A. Yes, sir.

Q. What had it?

A. A leg broken.

Q. What was that calf worth there in the condition you saw it?

A. I never saw the pedigree of it.

Q. You could tell by the looks of it; it was a black calf; assuming it was thoroughbred?

A. Worth three or four hundred dollars.

Q. I don't know that you understand my question. My question was what was that calf worth there in the condition you saw it, with a leg broken?

A. It was worth very little. I wouldn't put no value on it.

Q. What would it have been worth if it had arrived in proper condition?

A. It would have been worth three hundred dollars the way cattle were selling; it was a bull calf.

Q. Did you notice any other heifers that were injured there?

A. There were a great many of the cattle that were sore, jammed, stiff, looked very badly.

Q. Do you remember any particular ones?

309 A. No; I remember no particular ones, for there were too many; we just went over them.

Q. Let me refresh your memory. I will ask you whether you remember one cow lame in the fore leg.

A. There was one lame before or behind; it was limping behind or before.

Q. Were there not six that had aborted calves, and three bulls?

A. Yes, sir.

Q. How many were there in the lot?

A. I think there were somewhere from ten to fifteen—I could not tell exactly—we had put to themselves; then we went carefully over them to see if we had made no mistake.

Q. Don't you know there were six aborted cows and three bulls?

A. I don't know; I could not say exactly; there were somewhere—ten or fifteen.

Q. State to the jury how badly they were injured.

A. They were lame, some stiff—very stiff—and in some places the hide was knocked off.

Q. How did this lameness and stiffness affect their value in the market. Did it decrease their value?

Mr. POLLARD: That is the same question.

The COURT: He may state generally the effect of that.

A. Them cattle that were bruised so badly and lame could not be put on the market that fall; that was about the

310 20th somewhere, right in September.

Q. How long would it be, if they recovered, before they could be put on the market?

A. It would take them six or eight months before they could be sufficiently put in fix, in condition.

Q. What would it have been worth to give them proper attention and care per month to put them in proper shape and condition?

A. I should say five or six dollars a month; could not do it for less.

Q. About the balance of the cattle you have not specifically designated, what was their condition?

A. They were all sore, stiff, more or less; then we just made a general thing what we considered the damage of the balance—put down so many.

Q. Was the value decreased by reason of the accident or increased?

A. Of course there were some out of condition, because coming right off a journey. Them men had bought them cattle to sell for breeding purposes.

Q. Would an ordinary railroad accident be sufficient to have caused the condition of the cattle in which you saw them? I mean

an ordinary railroad journey; would it be sufficient to have caused the condition the cattle were in at the time you saw them?

311 A. It wouldn't if they wouldn't have been wrecked.

Q. I am not asking you about a wreck. I say an ordinary journey.

A. No, sir; I can say that.

Cross-Ex.

Cross-examination by Mr. WERNER, for defendant:

Q. What do you call an ordinary journey?

A. I call to ship them to Chicago, having no accident.

Q. Shipping to Chicago you consider an ordinary journey?

A. Yes, sir; or to St. Louis, either way.

Q. Probably a couple of hundred miles?

A. That is over four hundred miles to Chicago.

Q. That is what you mean by an ordinary journey?

A. Yes, sir.

Q. A journey from Scotland to Missouri wouldn't be an ordinary journey?

A. I never was in Scotland or Boston either.

Q. That would not be an ordinary journey over land?

A. Yes; it would be ordinary.

Q. You never made a journey like that with cattle?

A. No, sir.

Q. Had you ever seen a lot of cattle that made a journey of that distance before when they got off the train?

A. I don't know that I ever did; I don't believe I ever did.

312 Q. You could not testify as to the effect of such a long journey on a car-load of cattle, could you?

A. Yes; I think I could.

Q. You could give us an opinion upon it?

A. Yes.

Q. You never had experience?

A. No; I never had experience.

Q. I understand you one of the calves had a leg broken?

A. Yes, sir.

Q. In shipping these cattle, where there was no accident, a calf might have its leg broken in the cars by others?

A. I don't know how that might be. Them cattle were sore. It might be, if you undertook to splint it, it might get well.

Q. A calf with a broken leg could not stand up?

A. It could stand upon three legs.

Q. Stand up a journey of six hundred miles?

Q. It could lay down; none of the cattle always stand up.

Q. It would be very easily discovered if its leg were broken?

A. Discovered very easily by me when we took them up.

Q. If that leg were broken at some place in Ohio the people who had an opportunity to inspect those cattle must have discovered the leg was broken.

A. Eh?

Q. And they would have put a splint on?

A. I don't know whether they would have done or not.

313 Q. Had you ever owned any of these cattle prior to the time you were called upon to appraise the damages?

A. No, sir; I never had owned any of them, but I bought some mighty quick afterwards.

Q. You bought some afterwards?

A. Yes, sir.

Q. Had you been familiar with the market value of that class of cattle here prior to that time?

A. I had with Mr. Estell's cattle previous to that herd of cattle.

Q. That they sold before that?

A. No; they had on their place; had them on their place; a few cattle; black cattle. You see these cattle hadn't been introduced in this country but two or three years before that.

Q. Did you know of sales made that fall—the fall of 1883—September, 1883, at the time they arrived?

A. No; but the fall before I had and in the spring. There had been some sold at Kansas City. I saw the reports.

Q. You know what these animals brought the fall before and the spring before; you don't know of sales made that fall which would give you the market value?

A. No, sir; but I know that spring; that May.

Q. At that time you didn't know what the market value was; you didn't know of any sales?

A. I didn't know of sales.

Q. How did you get the market value?

314 A. Because I went back to May.

Q. You went back to the last sale?

A. Yes, sir.

Q. To find the market value?

A. Yes, sir.

Q. When you say these bulls were worth $500, you mean if they had been put on the market in good condition the spring before they would have brought $500?

A. Yes; and they would have brought $500. I was at the Kansas City sale, and I bought the cheapest bull sold at the Estell and Elliott sale, the cheapest one of those calves; that was $325.

Q. That was the cheapest one?

A. Yes.

Q. That was out of this lot?

A. That was out of this lot.

Q. $325?

A. Yes, sir.

Q. Have you got it yet?

A. Yes, sir.

Q. How did it turn out?

A. It turned out tolerably well.

Q. It was a good bull calf?

A. Yes; it was a very fine bull calf.

Q. In good condition when you bought it?
A. Tolerably good condition; just tolerably good condition.

(By a JUROR:)

Q. Was that one of those imported calves or not?
A. Yes, sir.

(By Mr. WERNER:)

Q. Which you bought?
A. Yes, sir.

Mr. WERNER: I thought it was a bull calf?
WITNESS: It is a bull calf.
315 Mr WERNER: I beg your pardon. I thought you said a calf. It was the first bull calf I ever heard of aborting.
WITNESS: You will find out a good many things yet, young man.

Q. I am trying to find out some things. You say you paid $325 for a bull calf, and that was the cheapest one sold?
A. Yes.
Q. It was in good condition?
A. It was in fair condition.
Q. How did it come it didn't sell for the average price?
A. I reckon it was a little younger than some of the others.
Q. Do you remember the name of it?
A. Yes, sir; I remember the name of it—John Elliott. I named it myself.

(By Mr. POLLARD:)

Q. I understood you to say you never saw cattle that had come on from so long a journey by rail as from Boston to Estill?
A. No; not that I know of—not that I know of.
Q. You said Mr. Estell or Mr. Elliott told you the railroad men were to meet them there at Estill?
A. Yes, sir; I will say farther——
Q. I don't ask you to state farther on that point. Did there any railroad men appear there?
A. No, sir.
Q. So there was no one there that was interested in the transaction but the Estills and Elliotts?
316 A. They said they would be there on the four o'clock train in all probability that evening. They didn't come after I got down. It was about half past five, I reckon, when we got through appraising the cattle; then nothing would do for Mr. Estill but what I must come next morning. They said the men would be on the four o'clock train.
Q. I don't want you to tell that.
A. I was going on to tell what it was; so, then, I will stop now.

(By a JUROR:)

Q. Mr. Nance, a good ordinary bunch of short-horned cattle, high-grade cattle, what is the difference between the price in Chicago of

these polled Angus high-grade cattle on the market, or what has been the difference?

A. Well, it ranges from two bits to half a dollar.

Q. That is a hundred?

A. Yes. I can take a car-load of nice polled Angus black cattle and sell them, with nice short horns, and they will bring more money and sell quicker.

(By Mr. WILLIAMS:)

Q. For beef?

A. Yes, sir. I don't mean these fine thoroughbred. I breed these fine bulls to short-horn cows, and then we make common cattle for beef.

Q. The value of these depends on the number of them in this country?

A. Yes, sir.

317 Q. About how many head of cattle do you ordinarily put in a car for shipment?

A. That depends.

Q. I mean for shipping purposes—cattle weighing from ten to 12 or fifteen hundred pounds.

A. I put in eighteen or twenty. When they get up to fifteen or sixteen hundred pounds I put less in a car.

(By Mr. POLLARD:)

Q. Do you put in eighteen or twenty and carry food along?

A. No, sir; never carry feed.

Q. You can put more in a car?

A. Yes, sir.

Jno. H. Turner.

JOHN H. TURNER, sworn on the part of the plaintiffs, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. Where do you reside?

A. Glasgow, Howard county.

Q. How long have you lived there?

A. Fifty-one years, lacking about six or eight months. I was in St. Louis during the war.

Q. What is your business?

A. Farming.

Q. Do you do anything else in connection with farming?

A. I am just a farmer and stock-raiser.

Q. How long have you been dealing in stock?

A. About thirty years—all my life. I was raised right on a farm.

Q. How far do you live from the Estells and Elliotts, where these black cattle are raised?

A. About fifteen miles.

318 Q. I will ask you if you were acquainted with the value of black cattle in that vicinity in the fall of 1883.

A. Yes; I think I was.

Q. Did you see these particular cattle?

A. No, sir.

Q. Of Estell and Elliott?

A. I didn't see them.

Q. I will ask you what effect, if any, the fact a cow had aborted its calf would have upon its market value, if any.

Mr. POLLARD: We object.

The COURT: You refer to this particular kind of cattle?

Mr. WILLIAMS: Yes.

The COURT: And to this place?

Mr. WILLIAMS: Yes. I will change the question. State, in your judgment, what would be the effect upon the market value of one of these black heifers by reason of its having lost its calf through abortion produced by violence, in 1883, in Howard county, Missouri.

Mr. POLLARD: We object. I think, independent of his knowledge of these cattle, it is an expert question.

The COURT: I will let him answer that question in this form.

Counsel for defendant then and there duly excepted to the ruling of the court.

(Question read.)

319 A. The difference would be the value as beef and as breeders. It would have been, in the year 1883, somewhere in the neighborhood of four cents for beef purposes and $500 for breeding purposes on that class of cattle.

Cross-Ex.

Cross-examination by Mr. POLLARD, for defendant:

Q. What do you base your judgment upon, Mr. Turner?

A. I hold, gentlemen of the jury, that a cow that has once — is valueless as a breeder. You might present to me a cow with a pedigree that would be worth $500. I would be willing to pay that much for it. I would ask the question if she was all right, — you would say she had aborted once that would settle it. I wouldn't have it at all. You could carry her back. I wouldn't have it.

Q. That is not the question. Your opinion is based, if I understood you, on your belief that an aborted cow would not bear another calf. Is that it?

A. As a general rule they will not bear other calves. It is a difficult matter to get them to bear calves. They require a great deal of attention, close watching.

Q. There is no way of determining whether they will or not until tested?

A. No, sir. You have got to give them very close atten-
320 tion. You can get them with calf, but they will not bring the calf to maturity.

Q. What experience have you had in aborting cattle?

A. I have had several cows that aborted on my place.

Q. Have you had anything to do with this kind of cows?

A. Yes, sir; I have some of those cattle, but I never had one of those abort on my place.

Q. Those cows you had that aborted were what kind?

A. They were high-grade cattle.

Q. What kind?

A. Thoroughbred, short-horned cows. I had some thoroughbred, short-horned cows abort, and I had some high-grade short horns. I never had any Angus cows abort.

Q. How many have you had abort of every kind?

A. I suppose ten or twelve.

Q. What caused the abortions—could you account for any of those?

A. Sometimes falling in slipp-y weather in winter time, on account of the ground being bad for them to get over.

Q. Can you remember any particular cow that aborted in which a fall was the cause of it?

A. No, sir.

Q. Did they come along near each other?

A. No, sir; they varied—sometimes in winter, sometimes all along through the year.

321 Q. You think it is very difficult to tell what is the cause of an abortion?

A. I don't think a man could tell unless he would be close to the cattle every day and watch them closely to see the cause of the abortion. I remember one occasion about two years ago I put my cows all up on a marsh; next morning I saw a fœtus; that may have done it. They were horned cattle; being on damp ground during the night I supposed produced it.

Q. You don't know anything about that?

A. No.

Q. Did you have any other experience with any other cows but your own that aborted?

A. No.

Q. Have you ever made the subject a study?

A. Abortions?

Q. Simply in connection with your own cattle. You never have practised the business of a doctor?

A. I tried to ascertain the cause and tried to find a remedy.

Q. Simply for your own use, with your own cattle?

A. Yes, sir.

Q. Now, when your cattle aborted, did you sell them off as soon as they aborted?

A. As soon as I could get them in condition; sometimes they might not be in condition. A cow after she aborts generally takes about the same time to recover from it as she would to produce a calf in the natural term.

322 Q. You immediately put them to the bull?

A. I never tried to breed them any more; if they bred it was an accident.

(By a JUROR:)

Q. Do you own any thoroughbred, what they call polled Angus imported cattle?

A. Imported cattle.

Q. What did you pay for the bull?

A. My bull, I bought him in the spring of 1883, cost me $885.

Q. Do you own any now?

A. I have the same bull yet and the same original cows I bought.

Q. What did they cost?

A. I don't remember just what the cows cost. The bulls cost me that much money. The two cows and the bull cost me $2,000. I think I paid $666, some odd dollars, for the three; the bull cost me $885.

Q. Where did you get that bull and cows?

A. From the herd of Estill. That was before those cattle were imported by Estill and Elliott from Scotland. I believe shortly after this sale. I got those cows from Gary Brothers, then located in Canada.

Mr. WILLIAMS: You say the three cost $2,000—the bull $800?

A. $885 is my recollection—the bull.

Mr. POLLARD: When did you buy those?

323 A. The spring of 1883; the 11th or twelfth of April, 1883.

Q. Why did you go to Canada to buy them?

A. I didn't go to Canada, I went to Kansas City. I said the Gary Brothers were from Canada; they brought the cattle to Kansas City for sale.

Q. Isn't it true there were very few of this breed of cattle in this country in 1882 and the fore part of 1883?

A. I know there were fewer when I bought than there — in the fall.

Q. In 1883, isn't it also true a great many went to Scotland and imported large numbers of them?

A. There were a good many imported in 1883.

Q. Other shippers besides the Leonards and Estells imported them?

A. Yes, sir.

Q. Didn't large shipments affect them arket price of the cattle?

—. ——.

Mr. COSGROVE: Do you know of other shipments besides the Leonards and Estells?

A. They are the only shipments I have personal knowledge of.

Mr. POLLARD: Didn't you attend some sales in 1883?

A. I was at a sale at Estell; also at Kansas City in the fall.

Q. Were there not cattle of a great many different people at Kansas City at that sale?

A. There were various herds of cattle, different kinds.

324 This particular class was not very numerous.

Q. There were other cattle?
A. There were other cattle there for sale in the fall of 1883.

(By a JUROR:)

Q. What was the age of this bull?
A. I bred him the day I got him to one heifer; he proved not to be in calf; when I bred that bull he lacked one day of being one year old; when I got him I bred him to another, after I got him in April; she produced a calf; she was a two-year-old.
Q. Did you buy any at Kansas City of the Estell lot?
A. No; I made one bid; that cow was $1,000.

A. A. Walker.

A. A. WALKER, sworn on the part of the plaintiffs, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. Where do you reside?
A. Cooper county.
Q. How long have you lived there?
A. I was born there.
Q. What is your business?
A. Farmer.
Q. Anything else in connection with farming?
A. I cannot say if there is—stock-raising, of course.
Q. What experience, if any, have you had in handling stock; how long and what kind of stock?
A. Since I have been of age I have owned a herd of short horns; handled other stock in connection.
325 Q. What experience have you had in observing thoroughbred cattle, becoming acquainted with them, if any, outside of your own herd?
A. I have been a pretty close observer. I have been interested in them, more or less. I could say I have taken such interest as a stockman would generally take, being at fairs, sales, etc.
Q. Have you not been frequently a judge at fairs of fine stock?
A. Yes, sir.
Q. Is it a fact you gave special attention to the matter?
A. I gave it special attention.
Q. Were you acquainted with the black cattle that are spoken of?
A. I never owned any of them myself. I handle short horns. I examined the cattle critically very frequently from the time they were introduced—from the very first.
Q. Did you ever see either the Leonard or the Estill cattle that were shipped over in 1883?
A. Yes, sir.
A. I will ask you if you know what the value of black heifers and cows was in 1883. I ask you if you know what was the market value.
A. I know it by sales.

Q. I will ask you if you are acquainted with the effect upon the market value in 1883 that the abortion of a cow would have upon that kind of cattle.

326 A. Well, I would have my idea about it. I presume every stockman would. I don't know whether they agree or not exactly.

Q. I don't mean about that. Do you know what effect it would have upon the market value?

A. I think I do.

Q. State to the jury what would be the effect.

A. I don't think a man who is investing in a herd simply for breeding purposes would invest in cows that had failed to produce calves. He might know what the cause was, and he might be less inclined to think she would fail to breed after than some other men. He might buy them. As a rule, a man that would buy breeding cattle wouldn't want to buy cows that had not proven to be breeders.

Q. What would be the effect on the market value for breeding purposes?

A. That would be pretty good evidence—how it would affect it. A man might be less influenced than others. Some men might buy them.

Q. I was speaking about the general market. Would it make it more or less?

A. It would, of course, be worth less.

Q. What, in your judgment, would one of the heifers have been worth, an average heifer in the lot worth, had it arrived in the condition it ought to have done if it had not aborted its

327 calf?

A. I will state this: I didn't see those cattle on their arrival here, but at the sale I saw some. I didn't see those cattle in the condition they arrived.

Q. My question is, What would they have been worth in 1883, if they had arrived in good order and condition, of course?

A. Well, I can only answer by telling what they sold for. They sold all the way from $450 to $500, $1,000, and $2,000, I saw them sold for.

Q. What would an animal worth, say, $500 have been worth on the market in 1883 if she had aborted her calf?

A. The prejudice that might exist among breeders would bring it down to beef price.

Cross-Ex.

Cross-examination by Mr. WERNER, for defendant:

Q. You don't know of any cows having been sold in public as aborted cows, do you?

A. No.

Q. So you really don't know whether there was a market value for them?

A. I never heard of aborted cows put up. I never bought cows in the same way.

Q. You mean your personal opinion?

A. Stockmen will understand about it.

Q. Stockmen wouldn't buy aborted cows for breeders?

A. He might. It would depend on their prejudice.

328 Q. Don't you think that a man wanting to buy one of these imported cows, knowing it had aborted, would be willing to give anything for the chance that it would breed again?

A. I say he might.

Q. How much would he give?

A. I state that might have occurred. An individual might buy a very fine animal; he might take his chances on it. I offered one to a man the other day for a hundred dollars; I thought it was worth $200. He died in three hours.

Q. That is the question, whether an individual would be willing to gamble on the chances.

A. Yes; that is it exactly.

Q. The individual would be influenced in his belief whether or not the cow would breed again?

A. Yes, sir.

Q. What is your individual belief about that?

A. I have known aborted cows to breed. I have known them not to. I happened to own one of that kind. That is as far as my experience goes. I knew what the feeling was.

Q. Take one of these imported cows that, in an average condition, if it hadn't aborted would be worth $500, and take her in an aborted condition. What do you think she would sell for, taking the chances of her not breeding again?

A. That is a question I might answer one way and another. I hardly know how to answer it. If I were going to buy one I would buy one of the other.

329 Q. You say you attended these sales at Kansas City—Leonard's and Estill's?

A. I have attended two or three.

Q. In the fall?

A. Yes, sir.

Q. You say they sold all the way from $400 to $2,000?

A. I will just say I cannot tell exactly when it was. I attended two or three sales. I have been trying to recall to my mind when it was. I don't remember the year p-ecisely. I cannot say the date of those sales. I could not tell positively the year. I know it was after these cattle were brought over and were offered for sale. I was there. I could not name the year if you were to ask me.

Redirect.

Redirect examination by Mr. WILLIAMS:

Q. What experience have you had in shipping thoroughbred cattle from place to place?

A. Well, I cannot say I have had a great deal. I have occasion-

ally bought and had a bull shipped. I have not done much of that. I bought bulls and used them in my own county.

Wm. Gentry.

WILLIAM GENTRY, sworn on the part of the plaintiffs, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. Where do you reside?
A. Near Sedalia, Pettis county.
Q. How long have you lived there?
A. Since 1824.
Q. You are president of the State board of health?
A. Yes, sir.
330 Q. Had charge of this matter of looking after cattle matters in the State?
A. Yes, sir; to some extent.
Q. I will ask you what has been your business during your residence near Sedalia.
A. Farming. I was raised on a farm; have been living on one all my life.
Q. What particular branch of farming have you looked after?
A. Stock-raising.
Q. How long have you been engaged in it?
A. Ever since I was able to take charge of business.
Q. How extensively have you been engaged in it?
—. We have handled a good many cattle, mules, sheep, and hogs.
Q. What class of cattle?
A. I have had a herd of short horns for forty years, about.
Q. Were you acquainted with black cattle?
A. Some black cattle recently. In the last six or eight years we handled some black cattle and some Herefords.
Q. Were you acquainted with black cattle in 1883?
A. Yes, sir; I think I purchased some about that year or maybe just before.
Q. Did you ever see the Leonard and Estill importation of black cattle?
A. I saw Mr. Leonard's first importation—not the one that was wrecked. I didn't see those that were wrecked.
331 Q. I will ask you, Major, if you know what the value of black cattle was in Central Missouri in the fall of 1883. I don't ask specifically. Do you know about the value?
A. Yes, sir; I suppose I do.
Q. Do you know what the effect upon the market value for a heifer would be if the heifer had aborted?
A. I suppose I do, sir.
Q. What would be the effect? What would have been the effect in 1883?
A. I think it would bring the heifer to beef price among stockmen.

Q. Nobody else buys breeding cattle, as a rule?
A. No, sir; nobody handles them but stockmen for breeding purposes.

No cross-examination.

Thos. F. Houston.

THOMAS F. HOUSTON, sworn on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. Colonel, where do you reside?
A. Pettis county, Missouri.
Q. What is your business?
A. I am a farmer and stock-grower.
Q. How long have you been engaged in that business?
A. I have been engaged in farming in Missouri for forty-two years.
Q. What extent have you been interested in stock-raising, Colonel?
A. I have handled a good deal of stock in that time.
Q. What class of stock?
A. I think the first short-horn bull I ever bought was
332 about 1848 or 1850.
Q. In 1883 were you acquainted with the market value of black cattle—pedigreed Angus cattle?
A. Yes, sir; I bought some cattle in the spring of 1883 at public sale at Kansas City.
Q. Did you ever see this particular shipment of stock?
A. I didn't see that wrecked shipment at all; I heard of the previous shipment from the previous importation.
Q. State whether you are acquainted with the effect an abortion in a heifer would have upon its market value, in a heifer of the pedigreed Angus breed in 1883.
A. Well, I think if it were known that one of those black heifers had aborted breeders would not be disposed to buy them for that purpose. It would depreciate their value, probably, to beef price or near that. Some people might be willing to risk a little; others, perhaps, would not.
Q. In the general market you think it would bring it to beef price?
A. Yes, sir; I think so.

(No cross-examination.)

Abiel Leonard.

ABIEL LEONARD, sworn of the part of the plaintiffs, testified as follows:

Direct examination by Mr. WILLIAMS:

333 Q. Where do you live?
A. In Saline county.

Q. How long have you lived there?

A. I have lived in Saline—I was born in Cooper—I lived in Saline since 1872.

Q. What is your business?

A. Farming and stock-raising.

Q. How long have you been engaged in that business?

A. Since I have been able to attend to business; never followed any other business but that.

Q. What business was your father in before you?

A. In the same business; farming and stock-raising.

Q. What kind of stock?

A. Well, my father handled all kinds of stock. He was one of the first importers of black cattle to this side.

Q. What has been the class of cattle you have handled?

A. We have handled short-horned cattle; always had a herd of short-horned cattle. Since 1883 we have been handling black cattle in connection with short-horned cattle.

Q. Did you go to Scotland to make this purchase?

A. Yes, sir.

Q. Who went with you?

A. You speak of this——

Q. The one in controversy?

A. My brother Charles and I went in the spring of 1883.

Q. Any one else go at the same time?

A. Yes, sir; Mr. Will. Estell and Hugh Elliott.

334 Q. Were you present when the cattle were bought?

A. Yes, sir; my brother and I bought them.

Q. Which brother?

A. Charles.

Q. Which shipment?

A. This shipment in controversy.

Q. You bought yours of Estell and Elliott?

A. Our cattle, the Leonard cattle; he and I bought the Leonard cattle.

Q. How many did you buy?

A. We bought in this shipment 315 head.

Q. Where did you ship them from?

A. From Liverpool.

Q. Were you present when they were loaded on the ship?

A. Yes, sir; I assisted in loading them on the ship.

Q. What was the condition of the cattle when you put them on the ship?

A. They were in fine condition.

Q. Did you come over with the cattle?

A. No, sir; I remained in Scotland. I saw the cattle after they arrived on this side.

Q. I have not got to that yet. How many head did you buy?

A. We bought other cattle at that time besides this shipment?

Q. 315 in this shipment?

A. 315 in this shipment.

Q. What other cattle did you buy?

A. We bought cattle at the same time that we shipped to Baltimore.

335 Q. When was the Baltimore shipment made?

A. Those cattle came over some time in September, I think—September following this July the first ones we shipped.

Q. Did you buy these at the same time in Scotland?

A. Yes, sir.

Q. About how many did you have in the several shipment-?

A. About 460 came over last.

Q. To Baltimore?

A. Yes, sir.

Q. Did you come over with that or either?

A. I didn't come with either.

Q. When did you return to America?

A. My brother and I arrived in New York the last day of August, on a Saturday.

Q. Did you see the cattle then? If so, how soon after you reached here?

A. We went to Concord the following Monday, the day after, to see these cattle at Concord.

Q. That was after they had been moved from Waltham?

A. Yes, sir.

Q. Was that after they had eaten this Paris green?

A. Yes, sir. That is the thing we went there for—for that reason. We heard they had eaten it, and we wanted to see what condition they were in.

Q. State to the jury what condition you found the cattle in.

A. They were in fine condition. They were a lot of young

336 cattle when we bought them, in May and June, in Scotland. They were inspected at Concord. They had made as much improvement in that time as we expected to see them then. We were perfectly satisfied with the condition the cattle were in. I was satisfied with everything we saw there. There was only one trouble, and that was in regard to the water; the water was scarce at the time we were there. It was very dry that summer. The water became scarce at the time we were there. They were a nice-looking lot of cattle. We found them in condition.

Q. Were you there when they were shipped?

A. From Concord to Mount Leonard?

Q. Yes.

A. No, sir.

Q. Where did you next see them?

A. I next saw the cattle at Mount Leonard, after they had been shipped there.

Q. What condition were they in when you saw them?

A. They were in a very bad condition.

Q. State specifically, as far as you can, what you mean by bad condition.

A. It was a lot of 300 head of young cattle. They had been in this wreck. They were badly jammed, mashed, bruised. I was in

Chicago at the time they arrived. I had gone there to see
337 these gentlemen, the managers of the railroad. I didn't get home for several days after that time. When they were on the farm they were stiff, sore, and lame and in a generally bruised-up and mashed-us condition.

(By the COURT:)

Q. Did you see them in Chicago?

A. Yes, I saw them in Chicago, on board the cars.

(By Mr. WILLIAMS:)

Q. Did you notice them there at Chicago?

A. Yes, sir. I said I didn't see them till they arrived at Mount Leonard. I was there when they passed through, but only saw them in the cars whilst on board of the cars.

Q. Could you see definitely their condition at Chicago?

A. No, sir; not definitely. I saw they were badly injured, though.

Q. After they got home, after they got to Mount Leonard, were they all kept together?

A. No, sir. The bulls were separated from the heifers. The heifers were taken to several different pastures. They remained on my brother Leverett's farm for several days, when we made a division of them.

Q. How many were over on your place, if any?

A. My brother William and I took half of these cattle; then he and I subsequently divided this half. He took one-half of that half, which gave me one-quarter of the cattle on my farm.

338 Q. Do you know specifically anything of the cattle that were left on your brother Leverett's or your brother William's farm after the division?

A. We live right there, within a few hundred yards of each other; our farms adjoin. We see each other every day. I would know in a general way as to how these cattle were getting along. We were interested in the cattle. We would see each other. We were all interested in each other's cattle. We would ask each other as to their cattle and their condition. In that way I would know their condition.

Q. Coming to these cattle, I will ask you were any of them injured?

A. Yes, sir.

Q. Are you able to state whether any of the bulls were injured; if so, how many and how?

A. They were all injured more or less.

Q. What do you mean?

A. All of the bulls were stiff and sore.

Q. How many of the bulls did you have on your farm?

A. There were forty-nine Galloway bulls. I got about one-quarter of that, making me have about fifteen head.

Q. Did you have any Angus bulls?

A. There were only six Angus bulls in that lot.

339 Q. Did any of those come on your place or do you know?

A. No, sir. None of the Angus bulls came to my place.

Q. State whether you lost any of the bulls.

A. Yes; three of the bulls died on my farm.

Q. How were they affected before they died?

A. Until I had skinned them I could only tell they were badly injured. I could not see in what particular respect they were injured.

Q. How did they act?

A. Simply they were stiff and sore; they had no special appetite; they ate badly, got around badly. I could not see that any bones were broken and I didn't know that a bone was broken until I had skinned one after he had died. Then I found that three ribs had been broken right close to the backbone, right in front of the loins. I didn't know that until after I had skinned him; then I took his flesh off; it was badly bruised; for instance, on the inside—I remember taking the inside out of that bull—and the lining of his stomach was all badly bruised and in bad shape. In fact, all three that died, that was the only one that had any broken
340 bones. The other two, their flesh was bruised, showing they had been handled very roughly.

Q. When did they die?

A. They didn't die till along the latter part of November or about the first of December.

Q. State whether or not this condition you speak about continued from the time you first got there.

A. O, yes. They continually grew worse from the time they landed until they died.

Q. Were you acquainted with the value of those bulls—bulls of that character and kind—in that market in 1883?

A. At our market in Missouri?

Q. Yes.

A. Yes, sir.

Q. State to the jury what those three bulls would have been worth if they had arrived at Mount Leonard in 1883 in good order and condition.

A. A very ordinary price for them would have been $450 apiece.

Q. Did you have any care and trouble with those bulls in keeping them; expense?

A. Yes, sir. I did the best I could taking care of a lot of badly crippled cattle. We were not prepared on the farm to do that kind of thing like it ought to be, but we did all we could.

Q. You have said how these bulls were injured. Were
341 there any others injured specially, aside from the general injury?

A. No, sir; none other that had any bones broken—none but what could walk and get about. I didn't notice anything more than the general injury. It is not easy to tell an injury to a Galloway bull. Their hair is very long; they have no horns; they don't break their skin; their skin is not broken. You cannot see where they are injured. They have a long coat of hair; they can

be injured very badly and they will not show any external signs of it unless bones would be broken.

The COURT: Describe the character of the cattle.

A. It is not easy to tell just the injury the cattle receive. I wouldn't have known just what condition these cattle were in unless I had skinned them. If they hadn't died and I skinned them I wouldn't have known what condition they were in.

(By Mr. WILLIAMS:)

Q. Were there any cows injured on your place?

A. There were none that were specially injured. I mean there were no bones broken.

Q. Were there any whose market value was depreciated specially?

A. I think they were all injured in that way. The cows were all damaged, more or less, from this wreck they had passed
342 through; at the same time they were not in such condition that they could not walk and get about.

Q. What was the purpose of that importation?

A. The purpose was to bring herd cattle out there—to sell part and keep part.

Q. Sell them at what place?

A. To sell them during these—specially for these sales that were held at Kansas City in November.

Q. What time were stock sales usually taking place?

A. They took place in October and November, during the fat-stock show at Kansas City.

Q. When was the next stock sale that furnished a market for this class of cattle?

A. The following spring.

Q. If the cattle were not taken to the fall public sale the next public sale was in spring?

A. Spring—May or June.

Q. State whether these cattle were in a condition to be taken to market for the stock sale in the fall of 1883.

A. No; they were not in condition to be sold at all.

Q. State what was the cause of their not being in condition.

A. On account of the injuries they had received in this wreck.

Q. How was the condition of the market for this class of cattle in the spring of 1884, as compared with the fall of 1883?

343 A. You mean the prices that the cattle brought?

Q. Yes, the market price.

A. I think at that time all cattle had suffered a depreciation.

Q. Those particular cattle?

A. I think that there was some depreciation in black cattle, but less in them than in the others; there was a fall in them.

Q. You say the market price was less in the spring, but not as much less as it was for other cattle.

A. No, sir; there had been less depreciation in black cattle than in other breeds of cattle.

Q. Can you tell about what proportion black cattle were worth less in the spring of 1884 than in the fall of 1883?

A. I could not tell exactly; the depreciation was not very great.

Q. Do you know any particular cows you can call the jury's attention to specially, and the particular loss on account of it?

A. Well, I don't know that I can call the names of any cows; I don't remember; I cannot call the name of but one cow; I know she was the first one that aborted a calf after she got on my farm; I only remember her in that way.

(By Mr. POLLARD:)

Q. What do you say that was?

A. I just remember the nam- of one cow; I remember that from the fact she was the first one that aborted a calf.

Q. What was her name?

A. Mopea.

(By Mr. WILLIAMS:)

344 Q. What was it worth to keep one of those animals from the fall of 1883 to the spring of 1884?

A. It would be there six months.

Q. How much per month?

A. It would be somewhere in the neighborhood of four or five dollars a month; that would be a very reasonable charge on her.

Q. State whether there were any abortions by cows put on your place; and, if so, how many.

A. I know of twenty-five cows that aborted calves; there may have been others; I know of these.

Q. Of your own personal knowledge?

A. Yes, sir; my personal knowledge.

Q. What would these cows that you say aborted their calves have been worth at Mount Leonard in the fall of 1883 if they had arrived in condition to be placed upon the market at that time and without having aborted?

A. They would have been worth $500.

Q. $500 each?

A. Yes, sir.

Q. What were they worth in the condition in which they did arrive?

A. At that time I don't think there was a market for cattle in that condition.

Q. Was there any market for them as breeders?

A. No, sir; I don't think there was any market for cattle in the condition that stock was in when landed.

Q. Aborted cattle you speak about; well, cattle generally; black cattle generally?

345 A. I mean this herd of cattle—I mean cows. Of course there were bulls there. There was no market for them, for the reason men wouldn't want to buy high-priced cattle in the condition those were.

Q. You mean cows generally that came out of the wreck?

A. Yes, sir, generally; I speak as to the whole herd.

Q. It would affect the value of the whole herd?

A. Yes, sir.

Q. Were you acquainted with the value of black cattle at that time and place?

A. Yes, sir.

Q. Were you acquainted with the effect that an abortion would have upon the value of a black heifer at that time and place?

A. I don't know that I am acquainted with the effect it would have on black heifers; I know the effect it would have on cows generally.

Q. Of course, taking it generally, that includes heifers?

A. Yes, sir.

Q. The court requires us to confine it to black cattle.

A. The cows generally I would know the effect.

Q. Would you include in cows generally black cattle?

A. Cattle generally would include black cattle.

Q. What effect would that have upon black cattle?

A. The effect of an abortion would be practically to reduce the cow to beef price. I would like to qualify that statement to this extent, for this reason: it is not but what a cow may have a
346 calf after she has *had* aborted; they may have and they may not; but it is the uncertainty attaching to the cow after she has aborted. The uncertainty makes people hesitate buying them. For that reason I say the cow that has aborted would be practically reduced to beef price.

Q. Breeders would not have them on their place, as a rule?

A. No, sir.

Counsel for defendant objects.

The COURT: That is not proper.

Q. What would they have been worth for beef at that time?

A. This lot was two and three year old heifers; probably would weigh in the neighborhood of eight hundred or a thousand pounds. At 3½ or 4 cents, what they would probably bring, they might bring between $25 and $40.

Q. I believe you stated what they would bring if they had arrived in good order and condition.

A. Yes; $500.

Q. Can you state what the difference in the value of the cows that did not abort was in the condition in which they arrived at Mount Leonard from their value if they had arrived in good order and condition?

Counsel for defendant objects.

The COURT: That is substantially the question you asked a little while ago. When a witness is able to describe an injury and
347 then give his opinion as to the depreciation in value in consequence of the injury the jury has some means of testing the correctness of the opinion, but when a general description is given of a large herd they have no such means. I think that such testimony should not be received.

Q. Do you know of any abortions that took place in William H. Leonard's farm, of your own knowledge?

A. I could not state a positive number. I know they were going on all the time. I know cows were aborting on his farm.

The COURT: The twenty-five you spoke of were on your place?

A. Yes, sir.

(By Mr. WILLIAMS:)

Q. Can you specify any injuries to any of the cattle on William H. Leonard's place?

A. I don't think I can call to mind any special injury.

Q. Do you remember any on Leverett Leonard's place?

A. Yes, sir; I remember an injury to one bull on his place.

Q. What bull was that?

A. This was a bull called Lord William.

Q. What kind of a bull was Lord William?

A. He was regarded as a very fine animal.

The COURT: On whose place was he?

A. On my brother Leverett's.

(By Mr. WILLIAMS:)

Q. How was he injured?

A. He was injured in his left hind foot. I think it was the left hind foot—anyhow, his hoof; we thought he would lose it;
348 it was partially torn out; he could not touch his foot to the ground; the hoof was badly swollen, badly inflamed; it was loose; we thought he was going to lose it.

Q. Do you know what such a bull was worth in 1883 in Saline county?

A. Yes, sir.

Q. State to the jury what his value would have been if he had arrived at Mount Leonard in good order and condition.

A. He would have been a cheap bull at a thousand dollars.

Q. What was he worth in the condition in which he did arrive?

A. Just in that condition he was worth nothing, unless some man wanted to take the chances of his getting well; it didn't seem probable that he would get well at that time.

Q. Do you remember any cows injured on your brother Leverett's place specially?

A. No, sir; not any special injury.

Q. You didn't have charge specially of the cattle over there?

A. No, sir.

Q. You knew just generally?

A. Just in a general way from seeing them as I passed by the herd.

Cross-Ex.

Cross-examination by Mr. POLLARD, for defendant:

Q. Your farms adjoin at Mount Leonard?

A. The county road divides them.

Q. You saw them every day or every other day?
A. Yes; saw them frequently.
Q. This Lord William is the only bull you discovered had
349 any visible injury?
A. They had no flesh marks; there were bulls that were injured very badly, but the flesh was not broken on them.
Q. No bones broken?
A. No broken bones.
Q. They were feeding?
A. Yes, sir; they were bulls that got around badly injured in their backs.
Q. Do you know any particular ones?
A. I don't remember the names.
Q. Some of Charles' cattle were on Leverett's place, were they not?
A. Yes, sir.
Q. They were all there, were they not, for a time?
A. Charles and Leverett owned half of these cattle together.
Q. Sir?
A. They owned half jointly.
Q. After the separation of the cattle and Charles' and Leverett's were set off, how many were kept on Leverett's place?
A. There was a part sent to Charles' farm.
Q. A part were sent to another place?
A. Yes, sir.
Q. Up to the time they were sent off——
WITNESS: They remained on Leverett's farm.
Q. Half of the shipment was on Leverett's place?
A. Yes, sir.
Q. You took your quarter?
A. Yes, sir.
Q. William took his quarter. Where is William's place?
A. On the same side of the county road mine is.
Q. Adjoining yours?
A. Adjoining my place.
Q. His cattle—his portion of the cattle after the division were put on his place?
350 A. Yes, sir.
Q. This Lord William bull was injured in the hoof so you thought he would not recover?
A. Yes, sir.
Q. So far as you know, that was the worst injured amongst these cattle?
A. Yes, sir.
Q. Leverett's cattle?
A. We regarded him as being one of the worst injured, for we felt he was going to lose his hoof; without the hoof he would be useless.
Q. What became of that bull?
A. He did afterwards recover; he was sold.
Q. When was he sold?

A. He was sold, I think, at the sale in November.
Q. Sold at the sale at Kansas City that fall?
A. I think so; I think it was that fall.
Q. October or November?
A. Yes, sir.
Q. Did you see him there at the sale?
A. I think that was the sale we sold him at; we have had several sales there; you can settle the matter by looking. If he was sold there his name would be in the Breeders' Gazette as being one of the animals.
Q. I think it is.
A. I think so.
Q. You think it was at the fall sale? Of course that book will show?
A. That book will show.

351 Q. The question I asked you was whether you remember seeing him at Kansas City at the time of the sale?
A. I think I did, with all the others.
Q. Did you examine him then to see what condition he was in?
A. No special examination.
Q. You were not able to see?
A. He would not have been there if he had not been in good condition. I would be willing to testify he was in good condition because he was there.
Q. I understood you to say in your examination that these cattle were imported here with the intention of marketing them at those sales, the Kansas City sale or other sales, in the fall of that year.
A. Yes, sir.
Q. Is that correct?
A. Yes, sir.
Q. Did you intend to sell them all at that sale?
A. To sell as many as we could.
Q. Sir?
A. We expected to dispose of as many as we could.
Q. Did you really expect you would be able to sell them all at that sale?
A. We expected to. We had no doubt we would dispose of 315 head of cattle that fall. If we hadn't thought that we wouldn't have bought as many cattle as we did buy.
Q. I simply ask what your intention was. Did you expect to be able to sell them at that sale?

352 A. No, sir; we didn't expect to sell them publicly at that sale; but at such places a great many stockmen would come there and if the cattle were not sold publicly they would come and buy cattle privately. We expected through that sale, through the men who would come to that sale, to dispose of those cattle.
Q. You imported 460 head after that?
A. Yes, sir.
Q. The same fall?
A. Yes, sir.

Q. Did you expect to get rid of those entire eight hundred head that fall?

A. No, sir; we didn't expect to dispose of that 460 stock that fall.

Q. What was the reason you didn't sell more cattle at the Kansas City sale than you did?

A. The Breeders' Gazette gives twenty-five of mine and William's as selling twenty-five head.

Q. Gives that as yours and William's?

A. Mine and William's cattle.

Q. You had divided them before that?

A. Yes, sir.

Q. Do you know how many were sold belonging to Leverett and Charles at that sale?

A. No; I don't remember the number.

Q. How many cattle did you and William take over to that sale?

A. I think we took probably between fifty and sixty.

353 Q. You say of those you sold twenty-five?

A. Yes, sir.

Q. Were the fifty or sixty you took over all in good condition?

A. Yes, sir.

Q. Why didn't you sell more of them?

A. Well, the reason we didn't sell them was because the stockmen had learned of this wreck these cattle had been in and they didn't care to buy these cattle of ours, with the likelihood of getting non-breeders on their hands, when they could buy others without any such risk as that.

Q. Did anybody object to buying these cattle on that ground?

A. Yes.

Q. Sir?

A. Yes.

Q. Did you offer any cattle you didn't sell?

A. Yes, sir; I offered them.

Q. Did you put up any at auction you didn't sell?

A. No, sir; because when an animal was put up he was sold.

Q. You don't know but you might have sold the rest?

A. We didn't care to sell them at the prices they were bringing.

Q. You mean you stopped the sale because they didn't sell high enough?

A. They were not bringing satisfactory prices.

Q. Didn't your cattle sell as well as other cattle of the same character of cattle sold?

A. No, sir. Our bulls sold very well.

Q. The others not?

A. No; the heifers didn't sell well.

Q. Didn't they sell as well as other cattle?

A. No, sir; they didn't sell as well.

354 Q. Sold lower?

A. Sold lower; our bulls sold very well.

Q. Did you take cattle from your Baltimore importation to that sale?

A. No.

Q. They were all of this?
A. All of this importation.
Q. Why didn't you take some of those?
A. I don't think the Baltimore cattle had arrived at the time; sure they didn't. I didn't have any Baltimore cattle on the farm.
Q. Didn't they arrive in September?
A. They arrived at Baltimore in September; then they remained there for three months.
Q. How long?
A. They remained at Baltimore for three months.
Q. Isn't it a fact that this sale at Kansas City was a combination sale?
A. Yes, sir.
Q. And that each party sending cattle there was limited in the cattle they could send?
A. Yes, sir; my own lot was just about as many cattle as could be disposed of in one day's sale.
Q. There was a certain number fixed for each party to bring?
A. Yes, sir.
Q. What number was allotted to you and William?
A. It was fifty or sixty; it was about the number that could be sold in a day's time. He and I made the sale together, and we expected to have sold fifty or sixty head.
Q. You stopped the sale upon the ground they didn't bring enough?
A. Yes, sir.
355 Q. You could have sold the rest of them, could you, at the prices which the others brought?
A. Other cattle were sold after ours were withdrawn; we hadn't supplied the market at all.
Q. Other cattle were sold at the same figures?
A. There was a demand for cattle after we had withdrawn ours from the market.
Q. Could you not have sold at the price you got, if you hadn't stopped that sale, all you had there?
A. I don't know about that.
Q. You don't know anything to the contrary, do you?
A. No; I don't know whether the cattle I would have sold after would have brought as much as the cattle before; I don't know anything about it.
Q. You don't know?
A. No.
Q. Judging from the fact other cattle sold after yours, don't you think if you had offered yours they would have brought the same price substantially as those you did sell at the sale?
A. I don't think they would, because the men evidently didn't want to buy them. For that reason we withdrew them from the market.
Q. Did you make any guarantee at that sale?
A. None except what is usually made at such sales.

356 Q. Didn't you guarantee that the animals were in calf—the heifers.

A. I don't remember that we guaranteed the animals to be in calf. I don't remember any different arrangement at that sale to what is generally at sales.

Q. What is usual about that when putting up heifers?

A. As a general thing, cattle that are sold publicly, their breeding is guaranteed, and if there are any defects about the animal it is usually made known. Outside of that, a man buys an animal for just what he sees.

Q. You sold all you offered, did you?

A. Yes, sir. I don't remember of putting an animal in the ring and taking it out, for the reason when put in the ring it must go after the first bid; he was then in the hands of the bidder and the auctioneer.

Q. Were there any other public sales that fall?

A. Yes, sir.

Q. Where?

A. You mean were there parties selling at that time?

Q. No; other public sales that fall.

A. Yes, sir; there were sales in Chicago.

Q. What time?

A. Just following the fat-stock show in Chicago, following the one in Kansas City.

Q. How long after?

A. Began the next week.

Q. Did you take cattle there?

A. No, sir.

357 Q. Didn't have any at that sale?

A. No, sir.

Q. Why didn't you take cattle there?

A. We were satisfied with what we did at Kansas City; we didn't care to.

Q. When did you take cattle to another public sale?

A. We had a sale in Chicago. I don't think it was the spring following, but a year from that time. I cannot remember the times that we have had public sales. We have had several of them.

Q. Can you tell whether you had one in the spring of 1884?

A. No, sir; I would not be positive if we had a sale in 1884 or not.

Q. Do you remember what was the next sale to which you took cattle?

A. No, sir; I could not tell you where we did hold the next sale. I could not tell the different places; we were holding them, though.

Q. Can you tell what your cattle brought at those sales?

A. No; I could not tell what they brought.

Q. Do you keep any memorandum or anything by which you could determine that?

A. Yes, sir; I would know in a general way what they brought. We held a sale in Chicago; not Galloway cows; of Angus cattle they were; not of this shipment.

Q. In relation to the three bulls that were killed, they
358 were, I understand you, a portion of the cattle that were assigned to you?

A. Yes, sir.

Q. You had in your lot about seventy-five head?

A. Yes, sir. I would like to make a statement right in connection with those three bulls if I can do it.

Mr. WILLIAMS: Make it now.

A. When I said there were three bulls that were badly injured—there were five that were badly injured. These three died. Two of them didn't die. There were five bulls on my farm that were badly injured.

(By Mr. POLLARD:)

Q. Have you got them all in now?

A. I think so.

Q. What were the two injured that you have added now?

A. One of them was injured in the stifel.

Q. What was his name?

A. I don't know his name.

Q. Give us some idea of the character of that injury.

A. Well, if the stifel is injured it makes him lame; no use of his right hind leg.

Q. You are not able to give his name?

A. No, sir; I cannot give his name.

Q. Didn't he have a name?

A. O, yes; I had his name.

Q. Had it on the book or catalogue?

A. Yes; we had the whole of the bulls cattle catalogued. His name and pedigree was in the catalogue.

359 Q. You never took the trouble to see what it was?

A. Yes; I have known his name. I don't remember it now.

Q. What became of him?

A. I sold him to my neighbor.

Q. When?

A. I kept him for two years. I sold him in the summer of 1885.

Q. Was he able to serve?

A. He was able to serve just a limited number of cows. He never recovered the full use of his hind leg. He was hurt in his stifel.

Q. How did he act, could he walk right or did he always go lame?

A. He always went lame; he never recovered entirely; he recovered enough so this neighbor was willing to buy him.

Q. Now, the other one of the two you have mentioned now?

A. The other was injured from—it was a general weakness in his back.

Q. Sir?

A. The other was injured in his back.

Q. Could you see anything wrong about him?

A. No, sir.

Q. How did he indicate it?

A. Just in his loins, weak in his loins. He partially recovered from that, so much so I sold him at the same time, the same summer.

Q. Did he entirely recover from that?

A. No, sir.

Q. What was the trouble with him?

360 A. He never regained strength in his back to make him a good breeder.

Q. Did he serve cows?

A. He could serve just a limited number.

Q. Was it your intention to sell off all these cattle you had or to keep some for breeding purposes on your own place?

A. We expected to keep some.

Q. The three you testify about before, you say one when you opened it you found the ribs were broken?

A. Yes, sir.

Q. Was your attention called to that animal before its death?

A. Not to that fact.

Q. Was your attention called to it being ailing?

A. Yes, sir.

Q. In any particular?

A. By his general condition, by his growing thin, poorer, being in a very dilapidated condition.

Q. How long did he die after he arrived at home?

A. It was some time in the latter part of November or the first of December; it was before January; it was in the fall of the year.

Q. What did you discover in the other two? I understand you opened them all.

A. Yes; didn't find any bones broken; there were no bones broken but in one; the others, their flesh was very badly bruised.

Q. How did it look?

A. Looked that the blood had settled; it was blue, bruised,

361 sore.

Q. You said something about the stomach of one of them?

A. I noticed the stomach of this animal was bruised after taking the skin off. It looked like a piece of bruised flesh.

Q. Clotted blood?

A. Yes; there was no blood there just at that time, but it was black—the flesh was black.

Q. That is what you attributed the death to?

A. I attributed it to the bruise he received and that he had on other parts of his body. Other parts of his body was in the same fix. I remember specially the right hip, behind.

Q. I want to ask you about the abortions. I understood you to say there were twenty-five occurred in your lot?

A. Yes, sir.

Q. Did you see the fœtuses of all those cases?

A. No, sir; I didn't see that many fœtuses; I didn't see the fœtuses in a great many cases.

Q. How many did you see?

A. I don't think I saw over fifteen.
Q. Did you see fifteen?
A. Yes, sir; I saw that many.
Q. Did you keep an account of them?
A. I made no record of it; no written record of it.
Q. Did you examine the cows to see what cows had lost these calves?
362 A. No, sir; I never knew the name of a cow that lost her calf for that reason.
Q. For what?
A. I never made an examination of a cow to find out what her name was because she had aborted a calf.
Q. How did you know what particular cow it was that lost the calf?
A. No, sir; I could not tell these cows apart. I could not tell one from the other without examining the hoof and ear mark.
Q. You could only tell by taking up the cow, seeing the mark on her, and looking at the catalogue for her mark or name?
A. That is the only way I could identify it.
Q. Did you determine what particular cow each fœtus you saw came from?
A. No, sir.
Q. You don't know what became of those cows what dropped them?
A. No particular cow; no individual cow.
Q. You could not tell what became of them?
A. No.
Q. You had on your place about 75 animals—cows and bulls?
A. Yes, sir; I had a quarter of the whole number.
Q. About twelve of those were bulls. You had 49 bulls?
A. Yes, sir.
Q. Did that include Aberdeen and Angus, or did you have any of these?
A. Yes, sir; I got my part of both breeds of cattle.
363 Q. Do you know whether any of those Aberdeen and Angus cows aborted their calves?
A. Yes, sir; that one I spoke of was an Angus cow.
Q. The first one?
A. Yes, sir.
Q. How many of those cows have you sold?
A. I have sold them all.
Q. Do you know to whom you sold those that lost their calves?
A. No, sir; I don't know who bought them.
Q. They went off with other cows?
A. Yes, sir; they were sold just with others, principally; nearly altogether in the western country.
Q. Do you remember who you sold them to?
A. I remember different men I have sold cattle to; for instance, I remember selling twelve cows to a man named Cornforth, at Denver. I remember selling twelve cows to four or five other parties there. These twelve cows were of these aborted cows.

Q. How is that?

A. I say I just remember that instance, selling these twelve cows that had aborted; then twelve others I sold that had not aborted.

Q. How do you know they were twelve cows that had aborted?

A. Because they wouldn't breed.

Q. That is the only way you know?

A. Yes; and the further fact I never had kept one on my farm, Mr. Pollard, but what would breed; then these cows not
364 breeding, not getting with calf, and they were with calf when we got them.

Q. How do you know?

A. I just know. I know in a general way all of these cows we bought had been bred.

Q. How do you know that?

A. I was going to tell you. Because in the first place we bought them with the understanding the- should be bred; in the next place, when my brother and I saw them in quarantine they showed evidence that they had been bred and were with calf.

Q. All of them?

A. I wouldn't say every single one was with calf.

Q. Don't you know you were breeding those cows in quarantine all the time?

A. No, sir; I don't know that. I was never at quarantine but once.

Q. Hadn't you been told that by your brother?

A. No, sir; I don't know that.

Q. Don't you know he testified to that?

A. No, sir; I don't remember it at all.

Q. That they were breeding those cattle there?

A. As I say, I don't know each individual out of some 250 or 300 cows; very likely there would be cows which would not be in calf. A great majority of those cows were in calf before they left Scotland.

Q. All you know is what somebody told you about that?

A. I saw the bulls with them in Scotland.

365 Q. How?

A. Several lots of those cows—I saw the bulls were put to the cows. The bulls were put with a lot of heifers to serve.

Q. You didn't buy them in one lot?

A. No; I saw the cows in Liverpool. There was evidence there the cows had been bred; they showed that.

Q. Don't you know that animals died at Waltham, and some heifers were opened there and had no calves—were not with calf at all?

A. All I know about that is testimony I have heard at this trial. I don't remember what that is.

Q. When did you sell this lot you speak of selling in Denver?

A. I sold them in the spring of 1885.

Q. You are not able to say, not having the means of identifying those cows, whether any of those cows were aborted cows or not—you could not pick out cows that aborted?

A. No, sir. Those cows that had aborted were not mine.

Q. What do you mean?

A. I sold 24 cows there. 12 belonged to William and Leverett; 12 belonged to me.

Q. Of those 25 you have spoken of?

A. No, sir; I am talking of 24 cows I sold at Denver. 12 were mine. I sold 12 for my brothers, Willie and Leverett. Twelve cows I sold had not aborted.

366 Q. I am asking you what you did with those cows. You sold them—I understand you to say you sold some in Denver of those that had aborted. I asked you how many. You said you didn't remember.

A. I didn't mean to say I had sold any of my cows that had aborted there.

Q. It is only your cows I am talking about.

A. If I said that I didn't mean it, for those twelve cows of mine had calves by their sides when I sold them. I did sell 12 cows there that was of my lot.

Q. I am not asking you about Leverett's or William's. You have been confined in your testimony to your own cattle. I am talking about cattle you received on the division.

A. Yes.

Q. I want to know where you sold those cattle.

A. I could not tell one single, individual cow now.

Q. Where you sold her?

A. Where I sold her. I could tell where I sold a good many cows. I could not tell whether any one of those cows—any particular one of them—any individual cow—was one that had aborted or not.

Q. Could not tell that?

A. Could not tell it.

Q. So you didn't sell any of those as aborted cows—cows that had aborted?

A. I will tell you——

367 Mr. POLLARD: Answer me that question.

A. Yes, sir; they were sold as non-breeding cows from the fact they were not in calf, just as I sold these that belonged to William and Leverett. These cows had no calves by their side.

Q. I don't want you to get off. You were speaking in your testimony of some of these cattle not being sold as aborted, but as being sold as non-breeding. Is that correct?

A. These cattle, they were sold—most—I didn't sell but few of my cattle.

Q. I thought you sold them all?

A. No, sir; my brother, Leverett. They were sold through different agents. I didn't sell most of them personally. They were simply—in many instances they were shipped to agents of ours and sold by agents. That is the reason why I am speaking about this particular lot I did sell.

Q. The particular lot you did sell was sold where—at Denver?

A. Yes; but just part of those were mine.

Q. I am confining my questions to yours.

The COURT: 25 head you sold at Denver; 12 belonged to you and 12 to your brothers?

A. Yes.

Mr. POLLARD: I ask you about your 12. Could you say either one of those was one of the cows that had aborted?

368 A. No; I said just now they had calves; that 12 had calves.

Q. You know 12 had calves?

A. Yes, sir.

Q. They were sold as having calves?

A. Yes, sir.

Q. Did you make any other sales personally?

A. I made personal sales; yes.

Q. Where?

A. I sold cattle in Colorado, in New Mexico, and in Texas.

Q. Could you tell what those cattle brought?

A. These cattle I sold at Denver—the 12 that had calves—brought $6,000.

Q. That was in 1885?

A. Yes; that was in 1885.

Q. Do you know the price of the other lot?

A. Let me see; I sold cattle in New Mexico——

The COURT: We will not go any further until after recess.

AFTER RECESS.

The cross-examination of ABIEL LEONARD was resumed.

Q. What was the first heifer of that lot of aborted ones you disposed of that you noticed an abortion?

A. As I said, her name was Mopea.

Q. You saw the fœtus?

A. Yes, sir.

Q. When was that?

A. It seems to me it was the second day after they were unloaded.

Q. After they were unloaded on their arrival at Mount Leonard?

A. Yes, sir.

369 Q. Is that one of the 25 you have spoken of?

A. That would be one of the 25.

Q. That was before the cattle were divided?

A. In one sense they were divided; in another they were not; some were on my farm.

Q. I speak of the division we have all spoken of—between you and William and Leverett and Charles.

A. Well, that was before they were divided; at the same time they were on my farm.

Q. It was before the division of the cattle?

A. Yes, sir.

Q. You all owned them together?

A. Yes, sir.

Q. I understand you to say the 25 you have spoken of were all amongst the cattle that were turned over to you?

A. I afterwards got this cow; this cow was on my farm when she aborted, as the other cows were on my farm; they were on my farm before they were divided; there were some separate; some on my farm, some on Leverett's; they didn't all abort before the division.

Q. Is this cow one of the 25?

A. I include her in the 25, as I got her in the division.

Q. That was the first one in the whole lot?

A. No, sir; she was the first one I have any personal knowledge of.

Q. Do you know of any others before that?

370 A. Only by this testimony that others aborted. I say I knew nothing of that personally. I was not with them on the train.

Q. Has anybody testified that any of the Leonard cattle aborted on the train?

A. I think there was testimony in regard to some of their cows having aborted on the cars.

Q. Some of the Leonard cattle?

A. I don't know; I think so; I am not positive about it.

Q. Who testified to that?

A. I was thinking of the previous trial of this case. I am not positive of it. I don't make that statement positively.

Q. That is the first one, so far as you know?

A. So far as I know.

Q. That was about one or two days after the cattle arrived?

A. Yes, sir.

Q. Did she remain on your place from that time on?

A. Yes; she remained.

Q. What was the next one?

A. I could not tell the name of another one.

Q. Do you know what became of this one, Mopea?

A. No; I wouldn't state it positively, although I think I do; I wouldn't be positive in regard to it.

Q. What was it—"Lady Mopea," or simply "Mopea"?

A. No; Mopea.

Q. You cannot tell the name; can you tell the time when they occurred; about whether they aborted very soon after that or

371 whether they continued along from day to day, or week to week, or how long?

A. Well, those abortions continued along there until somewhere late in December.

Q. December, 1883?

A. In December of 1883, I said; December of that same year. They were occurring along at different times.

Q. How many of those had you personal knowledge of?

A. 25.

Q. You saw the fœtuses?

A. No; I didn't see the fœtuses of 25. I saw the fœtuses of some 12 or 15. Then I saw the cows.

Q. You knew from the indications on the cows?

A. I knew from the appearance that some cows there had given birth to fœtuses.

Q. Who took care of those cattle? Who fed them up to the time they were first divided?

A. Well, they were on my farm. I was there, and they were generally under my supervision.

Q. Who actually did it? Did you have hands there?

A. Yes.

Q. How many?

A. I would have probably four or five on the farm, as a general thing.

Q. That is, taking care of the whole lot?

A. Men just to take care of my farm—at work on my own farm.

Q. On your own farm?

A. Yes, sir.

Q. How many did Willie have on his?

372 A. Had about the same number as I.

Q. And Leverett and Charles about the same number of men?

A. About the same number of men—four or five.

Q. They did the actual feeding?

A. Yes.

A. And taking care of the cattle?

A. They did the work. At this time, though, there was very little feeding being done to those cows. They were running on grass. It was the fall of the year.

Q. You are speaking of yours individually?

A. I am speaking of my individual cows.

Q. How long did you keep them on the grass without feed?

A. The cattle we took to the Kansas City sale we fed them right along; though I didn't have them all running on the grass—some of the cows, especially—until some time in November. I fed them right along.

Q. All you expected to sell you separated from the rest and fed?

A. Yes.

Q. Did you feed them in a lot or put them in a barn?

A. For some time—until within a few days before the sale—they were fed on the pasture. A few days before the sale—a week or such a matter—they were put up in a barn.

Q. When did you commence feeding them for that sale?

A. Several weeks we were preparing these cattle for the sale.

Q. Several weeks before feeding them?

A. We were feeding them for several weeks.

373 Q. How soon after they arrived did you commence feeding those you intended to take to the sale?

A. They ran on the grass for several weeks without being fed—all of them.

Q. Those you took to Kansas City you also fed?

A. Yes, sir; I gave them extra care over and above those I didn't take to Kansas City.

Q. Those you didn't take to Kansas City you didn't feed at all?

A. No; — I said before, they principally fed on the grass every day; also fed them corn.

Q. You did feed them some?

A. Yes, sir.

Q. What did you feed them?

A. Corn.

Q. Corn in the ear or cracked?

A. No; fed them shelled corn. It was not cracked corn; shelled corn.

Q. Whole corn?

A. Yes, sir.

Q. How much did you give them a day—those you didn't intend to take?

A. I could not tell. It was just a small feed; as they had been accustomed. They had been accustomed to eating grain. I fed them just a little to keep them up.

Q. Had they been accustomed to eating corn?

A. I had no charge of these cattle in quarantine. My impression from what my brother said is he did feed cracked corn.

Q. As far as you know, did they feed them any corn before they got home?

A. O, yes; I know they fed them corn.

374 Q. Whole corn?

A. No; they didn't feed whole corn; corn-meal or cracked corn or whatever you call it.

Q. So far as you know they didn't feed them any whole corn till they got them home?

A. No; I am not positive as to any particular feed; I had no charge of them in quarantine.

Q. Those that you sent to Kansas City, you fed them how much?

A. Aimed to feed them about what they would eat.

Q. Corn altogether?

A. Corn and hay and oats.

Q. Anything else?

A No.

Q. Any meal—linseed meal?

A. No, sir; I fed no linseed meal. I fed nothing but corn, oats, and hay.

Q. In which lot did the abortions occur—the lot that were going to Kansas City or the other?

A. I remember the stock I intended to take to Kansas City—I had taken up for that purpose—that they aborted, and I turned them out and took others in their place.

Q. Are you able to say whether you took to Kansas City any that had aborted and had been served again?

A. No; I didn't take a cow there that had aborted.

Q. Do you know what these Galloway cattle that you bought cost in Scotland?

A. Yes, sir.

375 Q. Did you buy them yourself?

A. Yes, sir; in connection with my brother I bought them.

Q. You know, of your own knowledge, what they cost?

A. Yes, sir; I know what they cost; I made the contracts for them.

Q. What did they cost?

A. The younger heifers—I will just say the heifers and cows—cost thirty-one pounds, delivered at Liverpool.

Q. All except the bulls?

A. Except the bulls; cost thirty-one pounds; that would make about one hundred and fifty or one hundred and sixty dollars; the bulls cost more.

Q. What did the bulls cost—Galloway bulls?

A. The bulls—well, I will just say those bulls cost between thirty and fifty pounds; I would say, on an average, about forty pounds; that would make an average of two hundred dollars; there were several that cost a good deal more than that; bought at different prices.

Q. Some would be less?

A. There was nothing that cost less than thirty.

Q. The average of all the Galloway bulls, then, would be about two hundred dollars?

A. I would think it would be about two hundred dollars; yes.

Q. That was in Scotland? Can you tell what it cost to
376 deliver them at Mount Leonard?

A. Yes, sir; roughly, I can. We estimate it cost about ninety dollars to deliver these cattle from Liverpool to Mount Leonard.

Q. You bought them, paid the expenses; ain't you able to say exactly what it cost?

A. I did know what the entire expense was of the entire lot of our cattle; I don't know I ever knew what it cost per head, except it was an average of about ninety dollars apiece.

Q. What did the Aberdeen-Angus cost?

A. The Angus cows in that lot cost fifty-five pounds—about two hundred and seventy-five dollars.

Q. What were they worth where you bought them—at Liverpool?

A. That was at Liverpool; that was the cows that brought that price.

Q. The bulls?

A. I remember the price of several of the bulls.

Q. Were they bought together or individually?

A. They were bought individually.

Q. Can you state?

A. I remember the price of two bulls—one that was named Viscount Loftus—we paid one hundred pounds for; a bull named Jingo we paid one hundred guineas for, making one cost five hundred and twenty-five dollars and the other five hundred dol-
377 lars; the bull Jingo we paid one hundred guineas for, and the other we paid one hundred pounds for—a difference of twenty-five dollars between those two bulls.

Q. Jingo was how much?

A. One hundred guineas, five hundred and twenty-five dollars.

Q. The other was?
A. Five hundred dollars.
Q. What was that?
A. Viscount Loftus. They were two of the oldest ones. I remember them in that way.
Q. Jingo and Loftus. Were they sold at the Kansas City sale?
A. Yes, sir; they were both sold at Kansas City.
Q. Do you remember what they brought?
A. I think I remember what the bull Viscount Loftus brought; I am not positive of that. I believe the record says there it brought five hundred dollars. Jingo, I am sure, brought in that neighborhood; probably a little bit over.
Q. They are in that record?
A. Yes, sir; they are in that record there.
Q. Did you treat any of these animals that aborted, Mr. Leonard; did you do anything?
A. No; I never treated one.
Q. Just let them go—run into the herd again?
A. They ran into the pastures.
Q. With the other cattle?
A. With the other cattle.
Q. Just as they had?
A. Yes, sir.
Q. Did the bulls run with them?
A. No, sir; the bulls were separate.
378 Q. Kept up?
A. Yes, sir.
Q. Do you know anything about these cows being served with the bull afterwards?
A. Yes, sir; they were served.
Q. As soon as they came round?
A. Yes, sir; as soon as ever they were in condition they were always bred.

(By a JUROR:)

Q. In the division of those cattle were they divided by a valuation or by the head?
A. We divided them as nearly equally as we could, both in quality and in the number. We made the numbers equal; then we tried, as near as we could, to make an equality. At the same time we made no special effort to do that. We tried to divide them in as nearly equal parts in value as we could.
Q. At what they cost per head?
A. Not by the head. It was not in regard to the cost price whatever.

Redirect.

Redirect examination by Mr. WILLIAMS, for plaintiffs:

Q. You said something about animals being guaranteed at the sale. What did you mean by that?

A. I meant all the guarantee that was given was the guarantee that the record of these cattle was such as our catalogue gave it, and that we guaranteed further that the cows had been served at a certain time before the sale by certain bulls. That was all
379 the guarantee we gave at all.

Q. Did the guarantee cover the question of them being future breeders?

A. No, sir.

Q. This bull Jingo that was sold at Kansas City, what became of that bull?

A. He afterwards——

Mr. WILLIAMS: I want to know whether he came back to your place.

Mr. WERNER: I object.

Mr. WILLIAMS: I want to know whether they had to take him or whether they got the price they appeared to have got at Kansas City or whether he proved to be disabled and they took him back.

The COURT: You can show that fact.

Mr. WILLIAMS: How is that?

A. He was taken back. He proved to be a worthless bull and was sold for beef.

Q. By you?

A. Not by me, but by my brother.

Q. You, then, only got beef price for him?

A. He was sold for beef in Kansas City.

Q. Was he bought in for your brother?

A. My brother can tell that better than I can.

Q. You said in answer to Mr. Pollard you saw the — of fifteen cows. I believe you afterwards explained there were twenty-five cows that aborted?

Mr. POLLARD: He has gone all over that.

The COURT: He stated that a little while ago.

(By Mr. WILLIAMS:)

Q. You spoke of the two bulls during your examination
380 as having been injured you didn't mention in your examination-in-chief. One of them you said his hind leg was injured?

A. Injured in his stifel.

Q. What became of him? You say you sold him?

A. Yes, sir.

Q. What was the value of that bull in the condition in which he arrived at Mount Leonard in 1883?

A. In the condition he arrived he was worth nothing except for beef because the injury to his stifel was such that unless he did get well he could not use his hind leg, consequently could not serve a cow. In that condition he was worth nothing.

Q. Did he finally recover?

A. He finally recovered.

Q. What would he have been worth if he had arrived in good order and condition?

A. He was fully as good as the average of the bulls. He would have sold right along in that neighborhood—$500—with all the others.

Q. You spoke of one bull being weak in the back. He partially recovered?

A. Yes, sir.

Q. What was that bull worth in the condition he arrived at Mount Leonard?

A. In the condition he arrived he was also worthless.

Q. He recovered. How long did you keep him?

381 A. I kept him a year from the following spring or summer—about eighteen months. He partially recovered.

Q. What would have been his value if he had arrived in good order?

A. He was about such a bull as the others—worth $450 or $500.

Q. Mr. Pollard asked you in regard to some cows you sold. You said you sold twelve cows that had not aborted and twelve that had aborted. What did the twelve cows that had aborted sell for?

Mr. POLLARD: I object. He didn't state they had.

Mr. WILLIAMS: Twelve cows you sold in Denver that didn't have calves by their side.

Counsel for defendant objects.

The COURT: Those he stated were his brother's. You object to it?

Mr. POLLARD: We object.

The COURT: Do you object to their showing what they got for the twelve aborted cows?

Mr. POLLARD: Yes; two or three years after the accident.

The COURT: Then I will limit you to the difference between the market value.

Mr. POLLARD: I don't object on the ground that they cannot show the market value or that they cannot show what they sold for. It is upon the ground it is too far removed. He doesn't claim

382 they aborted; simply says they were without calves. It was in the spring of 1885—eighteen months after.

The COURT (to Mr. Williams): If they object to your going into that matter I shall sustain the objection.

(By Mr. WILLIAMS:)

Q. What efforts did you make to sell the cattle yourself, or did you sell them through others? Your aborted cattle I mean.

A. I didn't sell mine personally—this lot of cows you have referred to.

Mr. WILLIAMS: I am talking about you personally. How were they disposed of? I don't mean you individually.

A. They were disposed of by agents.

Q. Where?

A. In different parts of the Western country—Montana, Cali-

fornia, Arizona, Colorado, and New Mexico; all over the Western country.

Q. How long were you in disposing of them?

A. That was 1883. Up to 1886; it was continued up to two years ago.

Q. At what expense were you in making this disposition of them? Whether large or small is what I want to get at.

A. I will simply say the expenses were enormous.

Mr. POLLARD: I object. He has already stated he don't know where those aborted cows went.

The COURT: I don't think you can go into that. You have
383 shown what the expense of keeping them was. The difference in the market value is your damage.

Mr. WILLIAMS: If they are entitled to show what we sold them for we would be entitled to show when we got that price.

Mr. POLLARD: We would be glad to have them show what they sold the aborted cows for, if they can, but he says they cannot tell where they went.

The COURT: He has already stated he could not tell who he sold those cows to. He has said they were sold through various agents.

WITNESS: I know where I sent them to. I shipped them.

(By Mr. POLLARD:)

Q. Do you know what you got for them?

A. No, sir.

Q. They were sold with other cattle?

A. They were sold with other cattle and sold by agents. I know that the returns didn't amount to much, if anything. The expense eat up the whole business. All I wanted was to get rid of them; get them off my farm. I was not figuring much on what the cattle did bring me.

(By the COURT:)

Q. What do you say that bull injured in the stifel was worth when he arrived?

A. I said he was worth $500.

(By Mr. WILLIAMS:)

384 Q. In the condition in which he arrived?

A. In that condition he was worth nothing, except what he might have brought as beef, because his hind leg was useless.

Q. Have you any opinion what he would bring for beef?

A. Yes, sir; I suppose a two-year-old bull would weigh about eight hundred pounds, and he would be worth about three cents a pound. In the crippled, mashed condition he was in he probably wouldn't have brought anything. Men don't want to eat that kind of beef.

(By the COURT:)

Q. What was the injury to the fifth bull you mentioned? You said three died, one was injured in the stifel, and you mentioned another one.

A. Yes; injured in his back; was unable for about eighteen months to serve a cow. The second summer he did get so he could perform service with a very few cows. I let a neighbor have him at a very reduced price; since that the price has been very much reduced.

(By Mr. POLLARD:)

Q. Do you remember what your testimony was on the former trial as to the difference between the value of aborted and sound cows?

A. I wouldn't be surprised that it was different. My idea
385 now of aborted cows is that the damage is very much greater now than it was when I began handling these black cattle.

W. A. Harris.

W. A. HARRIS, sworn on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. Where do you reside?

A. Leavenworth county, Kansas.

Q. How long have you been living there?

A. I have been living in Leavenworth and Ducklin county since 1865.

Q. What is your business?

A. Stock-breeding.

Q. How long have you been in the stock business, stock-breeding?

A. Just about twenty years, sir.

Q. What has been your custom in regard to attending sales of stock?

A. I have attended a great many sales in the last ten or fifteen years.

Q. Were you acquainted with the value of black cattle in the Kansas City market and the neighborhood, western Missouri, in 1883?

A. I have never bought or sold any black cattle; I have merely attended their sales from curiosity.

Q. Do you know their value?

A. I have a general idea of the sales I attended.

Q. I will ask you if you know what effect an abortion will have upon the value of a cow that is valuable principally for breeding purposes?

A. It has an exceeding disastrous effect.

386 Q. State to the jury, if you can, what the difference in the value between an animal worth, say, $500, if in good order and condition and with calf, would be if she had aborted her calf.

A. I don't think any breeder would pay anything for her, sir, if he knew the fact. I don't think she would be sold at all.

Q. What would her value be?

A. Simply what she would bring for beef; that is all.
Q. What kind of cattle do you breed?
A. Short horns.
Q. Thoroughbred cattle?
A. Yes, sir.
Q. To what extent have you observed matters of that kind?
A. Well, sir, matters of what kind—abortions?
Q. Yes, sir.
A. I have been unfortunate enough to have aborted cows.
Q. Have you had any experience in the shipping of cattle by rail?
A. Yes, sir.
Q. State whether or not an ordinary trip by railroad of heifers—cattle that are properly cared for in cars—would be sufficient in itself to produce abortion.
A. In ordinary weather I don't think, with reasonable care and attention, it would be liable unless the cow were too far gone in calf.
Q. I mean where two or three months gone.

(No answer.)

387 *Cross-Ex.*

Cross-examination by Mr. POLLARD:

Q. What is your opinion of the value of an aborted cow based upon—the probability of her having another calf?
A. Yes, sir; largely. The trouble of them and danger — mixing with other cows.
Q. Contagion?
A. The effect upon other cows.
Q. What is your experience in shipping cattle; have you had any experience in shipping cattle in the heat of summer over as long a distance as from Boston here?
A. I have made some shipments from Quebec to Kansas; they have always been in cool weather.
Q. Don't you think it would be worse in the heat of summer?
A. It would.
Q. More liable to abort?
A. It would.

Dr. Glover.

Doctor GLOVER, sworn on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. Where do you reside?
A. I live in Saline county; I live in Marshall.
Q. How long have you lived there?
A. I have lived in Saline county since 1866. Part of the time I lived a year or two in Howard.

Q. What business were you engaged in before you moved to the town of Marshall?

A. The same I am in now—farming.

388 Q. Farming still?

A. Yes, sir.

Q. Have you anything to do with stock?

A. Yes, sir; I have always handled some stock.

Q. Did you examine the Leonard cattle that are in controversy in this suit?

A. Yes, sir.

Q. Who was with you at the time you examined them?

A. Judge Sparks and Mr. Hancock, a gentleman named Alkive, and Golden. I was with Judge Sparks and Mr. Hancock principally.

Q. What examination did you make of the cattle?

A. We went through them, looked at them—examined them, I suppose, about as well as I could.

Q. How long was it after they arrived?

A. I think we commenced the day after the cattle got there; that is my recollection; we were at it that day and the next day.

Q. Were the Leonards with you at the time you made the examination?

A. I don't think they were; I think they just simply told us where the cattle were; that is my recollection about it.

Q. How long were you examining them?

A. We went up the day after the cattle arrived; I think we were at it two days; didn't get through that day, and came back the next day.

389 Q. What did you find the condition of the cattle to be?

A. There were some of them pretty badly used up.

Q. What do you mean by "used up"?

A. I mean they were simply stiff, sore, and crippled; got about with some difficulty.

Q. Did you make a separate estimate of each animal or a general estimate?

A. I think we made an estimate on the animals. It has been some time; I don't recollect definitely. My impression is we made a separate estimate on the animals that we thought were badly damaged and those not so badly, and then made a general estimate. That is my recollection.

Q. Do you remember any particular animals that you can state were injured?

A. No; I don't know that I can. I recollect some were pretty badly crippled.

Q. What?

A. I thought they were pretty badly crippled; for that reason I did make a more minute examination. I was told the railroad company would be there the next day, and they were not.

Mr. WILLIAMS: I will simply call the witness's and the court's attention——

(Paper handed to witness.)

Mr. WILLIAMS: Is that the paper? I think I can probably come within the rule the court intended to lay down.

WITNESS: Yes; this is the paper.

(Paper handed to the court.)

390 Q. Do you remember the bull, Lord William, there?

A. I don't know that I do. I don't know that by name.

Q. Do you remember a bull badly injured there?

A. I do; there were one or two bulls badly injured.

Q. Can you say how badly?

A. No; I thought they were crippled; probably worthless; that the chances were that the two bulls—they might come out; I didn't know; we couldn't tell. I didn't make any prospective damages. My estimate was made on just what I could see.

Q. Did you take into consideration any abortions at that time?

A. No, sir; I didn't pay any attention; that was spoken of. I didn't regard that at that time.

Q. The estimate you made was a general one?

A. Yes, sir; just what I could see that day. There was one man wanted to make prospective damages. Him and I were so far a part we didn't have anything — with each other.

Q. Can you pick out any particular animal and state how it was injured—to what extent?

A. I don't know that I can. I think they were crippled in the loins; some seemed to be worse off. I don't know that I

391 could do it.

Q. You say some showed signs?

A. We would go through; drive them up in the farm. We just rode to the farm. We would see a cow or a bull laying down. One or two men would go and drive her—start her up.

Q. How did they move there?

A. They didn't move very well. They were badly stove up—a good many. Some were worse off than others.

Q. How many were in that condition?

A. I don't know that I could tell. My paper would tell that exactly.

Q. Was that paper made by you at the time?

A. It was made by myself——

Judge SPARKS:

Q. Signed by you?

A. Yes, sir; that is my signature to it. I once had a copy of it. I have forgot; I think I lost it.

The COURT: I think he can look at that for the purpose of refreshing his recollection to state about the general condition of the cattle. The paper itself, of course, is not admissible.

Mr. WILLIAMS: No; I don't offer it.

Mr. POLLARD: What is the ruling of the court?

The COURT: He can look at that paper to refresh his recol-
392 lection as to the condition that he found any of the cattle in—the general condition he found them in—if it serves to refresh his recollection.

(By Mr. POLLARD:)

Q. Is this the paper that was made by you at the time?

A. That is my signature to it. I had one just like it. I have misplaced it. Judge Sparks, I think, wrote that himself. This is my signature. This is the one I signed.

Mr. WILLIAMS: Look at that paper. I don't ask you to read it. Look it over, see if it refreshes your mind—recalls any particular number of the animals and the character of the injuries to that number.

A. I recollect I classified the cattle. I can refresh my memory as to that and about the amount.

Q. About the number that were badly injured?

A. I don't know that I can remember.

Mr. WILLIAMS: You can read the paper all over first.

A. I don't know but what it does. I recollect there were so many cows damaged—so many bulls. We went through and put an estimate.

Q. I am not asking about the estimate. Do you know how many bulls were badly damaged after reading that paper?

A. I don't know that I do.

393 Q. Do you know how many cows?

A. No, sir; I don't know that I do.

Q. You could not remember after reading the paper?

A. No, sir.

Q. Were you present at the sale of cattle in Kansas City?

A. Yes, sir; I was there one day.

Q. Other cattle were sold besides the Leonard cattle?

A. I think Mr. Matthews had some cattle sold. I think he did; that was my recollection. There might have been other cattle; it was a fat-stock show, I think.

Q. How did the Leonard cattle and the Matthews cattle compare as to quality and character, kind of cattle?

A. I think the Leonard cattle were equally as good cattle as the Matthews cattle.

Q. Were they the same breed as the Matthews cattle?

A. I think so; that is my recollection.

Q. How did they sell?

A. Well, my recollection is the Matthews cattle sold for the most money—that is, the cows averaged more than the Leonard cows; probably the Leonard bulls averaged as much, if not more, than the Matthews bulls. I won't be positive; that is my recollection about it.

Q. Was there any reason for that difference?

A. Yes, sir; I think there was.

Q. What was it?

394 A. Well, the objection I heard used by one or two was they were fearful of buying the cattle——

Mr. POLLARD: I object.

The COURT: I don't think that competent.

(By Mr. WILLIAMS:)

Q. Have you had any experience in regard to the effect an abortion will have upon the value of a thoroughbred cow?

A. Only just as my neighbor. I never owned any thoroughbred cows.

Q. I ask do you know what the effect is?

A. Yes, sir; I do.

Q. How would the value of a thoroughbred cow be affected by the abortion of its calf?

A. It would take back a thoroughbred cow and place her as a common beef cow.

No cross-examination.

J. W. Sparks.

J. W. SPARKS, sworn on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. Where do you reside?

A. I reside in Saline county, three miles south of Mount Leonard.

Q. What is your business?

A. Farmer and stock-dealer.

Q. How long have you been engaged in breeding stock?

A. Ever since I was grown.

Q. What kind of stock do you handle?

A. I handle short-horned cattle.

395 Q. Did you see the Leonard cattle in controversy in this case?

A. I did.

Q. How long was it after they arrived at Mt. Leonard you saw them?

A. It was the next day after their arrival.

Q. For what purpose did you go there?

A. I went there for the purpose of making an inspection of the cattle.

Q. State whether or not you did inspect them.

A. I did.

Q. What examination did you make of them?

A. I went through the cattle—through the entire lot of cattle; made a close inspection of the entire lot.

Q. I will get you to look over this paper. Read it yourself, and then, if you can, after refreshing your memory, state how many of the cows you found in bad condition; and, if so, what was their condition.

A. Well, I went through and examined the cattle and drove them up. They had been distributed into about four pastures, on the farm of Will. and Abiel Leonard—the cows were. The bulls were on Mr. Leverett Leonard's farm. There was a portion of the bulls—young bulls—in the pasture just south of Mr. Leonard's house. The larger bulls were in his barn lot. The cows were in about four pastures on Will. and Abiel's farm. We went through, drove
396 all the cattle; made a close examination of them. There were quite a number of the cattle that were very sore; hard to get up at all when we would go to them. A great many of them were lame, some in the fore leg and some in the hind leg; others were very sore; wouldn't scarcely move out of my way. We took a memorandum of the cattle that we considered were the worst damaged.

Q. How many cattle did you find that were badly damaged?

A. There were from 25 to 30 of that class of cows—cows and heifers that were very badly damaged—outside of those that showed their soreness, that we didn't consider so bad, we thought would get well in a shorter time.

Q. Did you examine the bulls?

A. We did.

Q. How many bulls did you find badly injured?

A. There were some six or seven of the bulls, I think six, we considered the worst injured.

Q. Can you pick out any individual—explain the character of his injury—of the bulls?

A. There was one of the largest bulls—one of the larger bulls—that was very sore in its foot and would hardly move, would hardly put it to the ground at all; didn't want to put any weight
397 on it. There was another bull seemed to be very sore at the time. We could not tell whether it was really in the loins or the thigh. He was one of the larger bulls, if I recollect correctly, about three years old. He was a nice looking animal, but seemed to be in very bad condition, either in the loins or thigh, and could hardly move himself at all.

Q. Were you acquainted with the value of black cattle in that neighborhood at that time?

A. I had seen sales the spring before, and from reports of sales in the papers—I took stock journals—and based my estimate upon that.

Q. What would that bull have been worth if it had arrived in good order and condition at Mt. Leonard?

A. The finest bull?

Q. That bull you say was injured in the way you said.

A. That bull—I made some inquiries of them as to his breeding. It depends a good deal upon the value of a bull as to the character and the pedigree of the bull. They told me that was one of the best bred bulls they had. I presume from the character, pedigree, and breeding he would have been worth a thousand dollars had he arrived in good condition.

Mr. COSGROVE: Which one was that?

A. One injured in the back and loins, loins or thigh.

(By Mr. WILLIAMS:)

Q. You spoke about another one injured in the foot—this
398 injured in the loins, what would that bull have been worth if put upon the market at Mt. Leonard in 1883 in the condition you saw him?

A. I don't think a breeder would want to buy him at all the day I saw him, because I regarded, as did other gentlemen with me, that in the condition he was in he might never recover, might be useless entirely.

Q. Those are two bulls; -he other six. Can you state the injuries to any others, the other four?

A. I think one of them was lame in the fore leg; they were all very sore; these six bulls were very sore.

Q. Outside of the 20 or 30 heifers you spoke about, what other cattle did you see injured?

A. Outside of the 25 or 30?

Q. Outside of the six bulls and 25 or 30 heifers.

A. The great majority of the cattle showed evidence of having been badly handled, badly jammed, sore from the journey.

Q. Were they in condition to be put on the market at that time?

A. They were not.

Q. Do you know how the value of a cow is affected by having aborted its calf?

A. I think I do.

Q. State the effect an abortion would have on the value of one of those cows.

A. If it were known she had aborted, breeders would
399 scarcely want to buy her at all, unless there was a guarantee she would prove a breeder thereafter.

Q. I mean put up and sold.

A. If she had aborted it would just be the difference between a breeder and a beef animal.

Q. How much would one of those cows have been worth for beef?

A. About forty dollars.

Q. What would they have been worth if they had arrived in good order and condition?

A. Four hundred or five hundred dollars.

Cross-Ex.

Cross-examination by Mr. POLLARD:

Q. Which one of those bulls was it appeared to be the worst injured?

A. The bull I spoke of as being injured in the thigh, loins, or hip seemed to be the worst.

Q. Did you know his name?

A. I didn't learn his name.
Q. Was it the one they told you was one of the best bulls?
A. Yes, sir.
Q. They were with you in making the examination, were they?
A. They showed us where the cattle were. We made the examination ourselves without them.
Q. Were they not along with you?
A. They were in the pasture with us.
Q. Didn't they point out the cattle that were injured and such as were the chief cattle among the lot?
A. None except the bulls—these six or seven bulls that
400 were at the barn. We asked them to point them. The other bulls, cows, and heifers, we went and made a personal inspection of them.
Q. About this bull they did tell you?
A. Yes, sir; because I asked about the character, the pedigree, breeding, etc.
Q. You don't know the name of the bull?
A. No, sir; I don't remember that they told me his name.
Q. Do you know what became of it?
A. I do not.
Q. Was there any visible injury about him—any external marks?
A. I don't recollect that there was about him, except he just was so sore and seemed to have no use of himself at all scarcely.
Q. Did you put your hand on it to see?
A. Yes, sir; he was very sore. He would flinch—put it on the loins and hip.
Q. Did he move?
A. You had to pull him by the head to move him.
Q. He could walk?
A. It was with great difficulty he could move.
Q. I understood you drove the cattle out of the pasture?
A. No; we were in the pasture where the cattle were grazing. They would be lying down. We would drive them up—went amongst them.
401 Q. Were these bulls in a pasture or in a lot?
A. These larger bulls were in the barn lot.
Q. Together?
A. They were in the barn and lot adjoining the barn.
Q. Were they in the barn or in the lot?
A. In a shed or barn and in the lot together.
Q. Tied?
A. Some were tied; some were loose. That one animal hurt in the thigh or loin, he was loose in the shed when we saw him.
Q. You have no means of identifying that animal. You don't know his name, I suppose?
A. Had no means of identifying him afterwards. I don't remember I saw him afterwards.
Q. Do you remember whether it was a Galloway or an Angus bull?
A. It was an Angus bull, if I recollect. I think these were most all Angus bulls. There was a large bull there that was—most all

Galloways, I mean. There was a large Angus bull there. He was not so sore as the others.

Q. What was this bull that was lame in the hip—a Galloway or an Angus?

A. He was a Galloway.

Q. Had you known any Galloway bulls sold as high as that?

A. I saw them sold for that the spring before.

Q. In 1882?

A. Spring of 1883; yes.

402 Q. Isn't it a fact that cattle were higher in the spring of 1883 than after these large importations came?

A. I think they were somewhat higher probably, but then my judgment was based upon what I saw sold in the spring of 1883 and reported sales that spring. I think there had been, if I recollect, no sales that fall; consequently I had nothing to base upon except the spring sales.

Q. You could not give any opinion as to whether that bull would recover or not?

A. No, sir; not at that time.

Q. The first bull you spoke of—that, I think, you said was injured in the foot?

A. Very lame in the foot.

Q. What was the character of the injury?

A. I think his hoof was apparently torn loose, if I recollect.

Q. Do you know what that bull was called? Do you know the names of the cattle?

A. I think that was the bull called Lord William. He was a Galloway bull.

Q. Did you think then that bull would recover?

A. I thought it would take a right smart time for him to recover from the lameness.

Q. What value did you fix upon him in his then condition?

A. I thought he was damaged about fifty per cent.

Q. What did you think he was worth if all right?

403 A. He was one of those extra well-bred animals.

Q. How did you know that?

A. I said I didn't know that, except from the statement they made when I asked them.

Q. They had told you?

A. Yes, sir.

Q. Before you made the appraisement?

A. Yes, sir; in placing the valuation upon him.

Q. What value did you put upon him, did you say?

A. I valued that large bull at a thousand dollars.

Q. Now, as to the other bulls, could you specify any injury? Could you discover any injury on them?

A. The other bulls outside of these six?

Q. After these two.

A. Yes, sir. I could see they were lame. As I stated, they were quite lame, some in the shoulder and others in one leg or the

other. I don't recollect distinctly which leg; some in one, some in two.

Q. Did they limp?

A. Yes; seemed very loath to move at all. The six bulls were very loath to move about at all; seemed to be very sore; what we call badly jammed.

Q. You saw no jam about them; the skin was not broken?

A. No, sir. Black cattle don't show it like white or red cattle. Their skin is dark. They would show it if the skin were torn.

404 Q. Did you discover any particular injury in any of the others?

A. Other bulls or cows?

Q. Bulls or cows.

A. Yes. There were quite a number of them, as I stated before, were lame, sore, but we only took into special account those that were the sorest; that we considered worse jammed than the others we took into general account. There were quite a number that we thought in a short time—say a month or six weeks—would recover, most of them from their soreness. It would take that much time, at least, for them to recover from the soreness.

Q. How long after the cattle arrived did you make this examination?

A. The next day after they arrived—that is, they arrived one day, were taken out to the farm; the next day following we made the examination.

Q. The second day after they arrived?

A. Yes. I don't know what time they arrived the day before. That was the next morning after they had been taken off the train we began our examination.

W. H. Leonard.

W. H. LEONARD, sworn on the part of the plaintiffs, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. You are one of the parties to this suit, one of the plaintiffs?

A. Yes, sir.

405 Q. Were you in Scotland at the time these cattle were purchased?

A. No.

Q. Were you at Boston?

A. No.

Q. Where did you see them first?

A. Saw them when they arrived at Mount Leonard.

Q. You and your brothers have separate farms there?

A. Yes, sir.

Q. I wish to examine you particularly about these cattle which, when divided, were sent to your farm. State if any animals on your farm were injured. If so, how? Begin with the bulls.

A. After they were divided five of the bulls that I got in the division were very badly injured—crippled in the shoulder, either in the hind leg or hip or back, I could not tell which. There were no deep sores or crush to be shown, but an internal injury. The five bulls were damaged—worthless. They could not serve or do anything with them.

Q. How long did you keep those bulls?

A. I kept those bulls, I believe, for eighteen months. I think I sold them in about 18 months.

Q. Did they finally recover?

A. Not entirely. I sold them as damaged bulls; rather I traded them off for calves.

Q. What would those bulls have been worth if they had arrived in good order and condition?

A. They were first-rate bulls in every other way. If not
406 injured I think they would have been worth $450 or $500.

Q. What were they worth in the condition in which you got them?

A. As they were then they were merely worthless.

Q. Do you have an opinion what they were worth?

A. I would say they were worth $25 or $30.

Q. Did you have any heifers injured?

A. After the division of the cattle in the next three weeks there were three two-year-old heifers so badly damaged they died.

Q. Totally lost?

A. Yes, sir.

Q. What would these heifers have been worth if they had arrived in good order and condition?

A. At least five hundred dollars the way they were selling.

Q. Had you any cows on your place that aborted their calves?

A. Yes, sir; there were 27 cows I got that aborted.

Q. What did you say those heifers were worth?

A. I think — worth $400 to $500 at least.

Q. 27 cows, you say, aborted their calves?

A. Yes, sir. I had 27 cows aborted their calves.

Q. I asked you the question—I think I understood your answer, Col. Boyd thinks I didn't—if the animals had arrived in good order and condition what would they have been worth? You said $500. Am I correct?

A. Yes, sir.

Q. Four to five hundred dollars.

407 *Cross-Ex.*

Cross-examination by Mr. POLLARD, for defendant:

Q. These five bulls were assigned to you in the division?

A. Yes, sir.

Q. Did you discover any injury in them when you made the division?

A. Yes, we had; there were a good many of these bulls damaged. I knew they were injured at the time I got them.

Q. What was their appearance at the time of the division?
A. They just looked like a generally stove-up lot of bulls; they were lame in the fore leg, hind leg, or loins; just showed they were crippled up.
Q. The heifers ate?
A. They could walk.
Q. Did they graze?
A. They were very poor eaters for some time after I got them.
Q. Didn't they pick up and improved?
A. Yes; they gradually improved along until 18 months, when I was able to sell them.
Q. I understood you could not discover any wounds?
A. No, sir; no broken bones. I could not discover anything, any particularly deep sores.
Q. How old were they?
A. They were two-year-old bulls.
Q. Galloways?
A. Yes, sir.
Q. Were they able to serve cows?
A. They could not at that time; no.
Q. Did they become so afterwards?
408 A. Well, they were badly crippled and could serve just a few cows, I suppose. I sold them for that purpose; they were willing to take them at the price I sold them at.
Q. Didn't they serve while with you?
A. No, sir; I never used them.
Q. Did you try them?
A. No; I knew the bulls could not do proper service; I knew that.
Q. You never did actually try them?
A. No, sir; I didn't use them at all.
Q. You had plenty of other bulls on the place, I suppose?
A. Yes, sir.
Q. Did you sell these altogether?
A. No; I sold two of them to one man, the other three to another man.
Q. There in your neighborhood?
A. In the county.
Q. What did you get for them?
A. I just traded them off for calves.
Q. To take the calves?
A. I just took short-horn grade calves for them.
Q. You traded them for other cattle?
A. Yes; I took them at about $75—that is what I 'put them in at; took the calves at that valuation.
Q. $75 apiece?
A. Yes, sir.
Q. What condition were they in, apparently, when you sold them? You never did try to see whether they could serve?
A. No, sir.
Q. What was their general appearance?

409 A. The bulls showed they had been badly used up at some time; that is about as much as I could see.

Q. Were they lame?

A. Yes, sir; they walked badly, very badly; lame over the loins; so much so they could not get around very well.

Q. As to these abortions, when did they occur?

A. Those cows began to abort just a short time after I got them on to my place.

Q. How long after the lot arrived at Mount Leonard?

A. We made the division just a short time after they came. These cows were on my place. They began to abort about the time I got them; within a day or two afterwards.

Q. How long after the time they arrived?

A. The first one I saw was the second day after they got there.

Q. Before the division?

A. Yes, sir; the one my brother spoke of in his testimony.

Q. The same cow?

A. Yes, sir.

Q. Do you include that in the 27?

A. No, sir; that was included in my brother's cows that Abiel got in the division of the cattle.

Q. Which brother?

A. Abiel.

Q. What I ask you is, how long after the cattle arrived at Mount Leonard did you first discover an abortion in the cattle that were assigned to you?

A. In about a week or ten days after.

410 Q. Do you know what animal that was?

A. No, sir.

Q. Know her name?

A. No, sir.

Q. What did you do with her, anything; treat her?

A. Some of these calves that were aborted were probably as big as a small dog. I always had those abortions covered up, buried.

Q. This particular one?

A. That is what I had done with that one. I had the abortion covered up.

Q. How long do you think that cow had been in calf?

A. I don't know; I am not much of a judge of that; probably two or three months; maybe three or four months.

Q. What did you do with the fœtus with the calf?

A. I say I just had it buried.

Q. In the field?

A. Not in that field; on the farm.

Q. Where those cattle were?

A. No; in one where there were no cattle.

Q. What did you do with the cow herself?

A. She just stayed in the pasture with the other cows.

Q. Can you tell what particular cow it was?

A. I could not by name. I knew the cow as one that had aborted.

Q. Did she show signs of it?

A. Yes, sir.
Q. You knew what cow it was?
A. Yes, sir.
Q. Do you know what became of her?
411 A. I know what became of some of my aborted cows.
Q. I ask as to this particular one.
A. No, sir; I don't.
Q. You don't know whether you sold her or kept her?
A. I know I sold her, for I didn't keep her.
Q. Did you sell all that lot of cattle?
A. Yes, sir.
Q. So you have not any of them?
A. No, sir.
Q. You don't know who you sold it to or when?
A. Not that individual cow I don't.
Q. You don't know whether she bred again or not?
A. No; I don't. I know she didn't as long as I kept her.
Q. You don't know how long you kept her?
A. These cows that aborted I told you I kept probably for 18 months.
Q. All of them?
A. All these aborted cows I did; yes.
Q. This particular cow, you don't know who you sold her to or when?
A. No.
Q. How can you say you kept her 18 months?
A. I say I kept those aborted cows I had on my place; I didn't sell any of them for 18 months.
Q. You didn't separate them from the other cattle?
A. No, sir.
Q. Do you know whether she was served afterwards with the bull?
A. Yes, sir; I know she was.
Q. How long after the abortion?
412 A. They usually came in heat three weeks after.
Q. Do you know whether she was with calf?
A. I know she was not.
Q. Do you know whether she ever had a calf or not?
A. No.
Q. You don't know?
A. No, sir.
Q. I don't exactly understand why you don't know that. You say you don't know she didn't have a calf from the first service; did you keep track of that individual cow?
A. I did not, but I had 27 aborted, and I didn't sell any of the 27 for about 18 months afterwards. I kept them there, trying to see if they would get in calf again, but they didn't.
Q. Could you tell those cattle without examining them?
A. Yes, sir; I believe any good stockman could do it.
Q. I am not asking about any good stockman?
A. Yes, sir; I could do so.

Q. You could tell each individual animal in your herd so as to identify it without taking it up and examining the numbers on it?

A. Why, yes; I think I could do that; but to take them each one, I would know if any one had anything particular wrong; I would know very well. If I had half a dozen boys, I suppose I would know them.

Q. Didn't you testify on the former trial you could not identify those cows?

A. I don't know that I did; I don't remember that.

413 Q. If that were so it is not correct?

A. It would not be correct.

Q. When did the next one abort?

A. They just continued aborting; they continued to abort for a space of about three months, these 27 did; these cows aborted within a space of three months.

Q. These 27 were all with your cattle together?

A. No; my farm is divided up into probably 8 or 10 different pastures; I probably had some four or five or six different grass pastures at the time; my cattle were divided in small lots, kept in those different places.

Q. These abortions occurred, you say, in different lots?

A. Yes, sir; not all confined to one lot.

Q. They continued on at about regular intervals?

A. No, sir; sometimes they might be within a few days' time; there would be three or four; then run along a week or two; a day or ten days or three weeks before there would be another.

Q. You continued serving with the bull as the time came round afterwards?

A. Yes, sir.

Q. Did you ever treat them or take any pains with them, or just let them run with the other cattle?

A. I just let them run with the other cattle. I had so much stock I could not do any other way.

Q. How many of those did you see the fœtuses of?

A. I think I didn't see the fœtuses of more than about 12

414 of them; twelve or fifteen of them. Some of these cows that aborted the abortions would be very small; others would be larger.

Q. So small they would be left with the cattle in the pasture?

A. No, sir; I think most all I saw were not certainly less than two months gone away.

Q. What evidence had you of the balance?

A. Just the general appearance of the cows showing it.

Q. Showing it?

A. Yes, sir.

Q. Could you always determine from that without seeing the fœtus?

A. Yes, sir; I believe a man can always tell that.

Q. What are the indications by which you determine that?

A. Well, bloodiness behind, showing they had given birth in some way.

Q. Is that a symptom that never manifests itself except when there is an abortion?

A. I wouldn't know about that. I know whenever a cow does that she usually comes in heat again, showing she is not in calf.

Q. What is that a sign of?

A. When a cow does that she surely comes in heat again, showing she has lost a calf.

Q. Whenever she shows those signs?

A. Yes, sir.

Q. How late—could you fix the time of the last abortion?

A. I think it was probably about three months after the arrival of the cattle.

Q. That would be the last of December?

A. Yes.

415 Q. How long did you keep the rest of the cattle, cows, aside from these aborted ones?

A. I sold some of the cattle at the Kansas City sale that fall; sold them along at intervals.

Q. Can you tell how long you kept them?

A. No, sir; I could not.

Q. Are you able to say whether any of these 27 head bred again?

A. Yes; there were seven of them; after keeping them 18 months, there were seven of them got in calf again and I sold them.

Q. When did you sell them?

A. I sold them to a gentleman in Kansas City for $150 apiece.

The COURT: Seven of these 27?

A. Yes, sir.

Mr. POLLARD: What did you do with the rest of them?

A. Well, my brother sold five of them out at Denver.

Q. Five of these?

A. Yes, sir.

Q. Do you know anything about that except what you got from him?

A. That is all.

Q. What did you do with the rest?

A. They were sold at different times—sold with other lots of cattle.

Q. With other lots of cattle?

A. Yes, sir.

Q. Do you know where, and whom they were sold to?

A. In the west—in Montana. No; not any individually; I don't know to whom they went.

Q. Are you able to say whether any of those bred again?

A. No, sir.

Q. You are not able to say?

416 A. Not able to say; no.

Q. Were they sold as breeding cattle, as breeders, or were they sold for beef?

A. Those men bought them out there for the purpose of breeding them.

Q. Do you know what you got for them?

A. No, I don't; they were sold through agents—went in with other cattle. I don't know how they did go.

Q. How were those cattle fed?

A. On my place?

Q. Yes.

A. They were running in grass pasture until I took up these cattle—a number of them—to put up with the sale. They were just fed grain in the troughs, not in the pasture.

Q. How long was it you began feeding them corn after their arrival at Mount Leonard?

A. As soon as I got them on my place I began feeding them.

Q. All of them?

A. Yes, sir.

Q. What did you feed?

A. Shelled corn.

Q. How much?

A. Not enough for them to eat at each feed, but enough to keep them going.

Q. You only fed corn?

A. No, sir; they had what *had* they wanted.

Q. Any other grain?

A. No other grain.

Q. You stated three heifers died.

A. Yes, sir.

Q. When was that?

A. About three weeks after I got there.

Q. Did you make any examination of them?

417 A. Yes, sir; they were skinned. I had the skin taken off them. I could find no bones broken; just generally bruised up—badly bruised.

Q. Did they die about the same time?

A. Died within a week after I got them—died within three weeks after I got them—over on my place. They died within a week of each other.

The COURT: You said those three heifers died?

A. Yes, sir.

Mr. POLLARD: Did you notice anything particular about them before they died?

A. They just didn't eat anything; they got around very badly.

Q. What was their appearance after they were skinned?

A. Badly bruised up.

Q. Whereabouts?

A. Over its ribs and sides.

Q. What was the appearance? Describe it as near as you can. Were there any cuts in the skin?

A. No.

Q. The flesh appeared to be bruised?

A. Just the flesh; yes.

Q. Was there clotted blood there or was it simply black and blue, or how was it?

A. Just as if the cow had been knocked down by something. On

taking the skin off she showed she had been badly bruised, especially after dying—after the hurt two or three weeks. She looked badly used up inside.

Q. Was there clotted blood there?

A. Yes, sir; I don't know but what there was. I don't know whether there was. I suppose there was.

Q. Was the flesh black and blue?

A. Yes, sir.

418 Q. Did you open them to see whether there was anything the matter inside?

A. I looked to see if they had any calf there.

Q. How was it?

A. They did have.

Q. They hadn't aborted?

A. No.

Q. You opened all three of them?

A. Yes, sir.

LEVERETT LEONARD, sworn on the behalf of plaintiffs, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. Are you one of the plaintiffs in this case?

A. I am.

Q. You are a member of the firm of Leonard Brothers?

A. One of the firm in handling these cattle. I have never been in any other partnership.

Q. Who composed that partnership?

A. Charles Leonard, William Abiel, and myself; four of us.

Q. It is hardly necessary to ask you if you are a dealer in imported stock. I will ask you the question.

A. Yes, sir.

Q. How long have you been engaged in importing it?

A. I imported a lot of these cattle in 1882; the first deal I had in these cattle.

Q. Have you imported any except this shipment since that time?

A. Yes; I have been interested in four or five different shipments, including that one.

Q. Did you deal in other cattle besides those?

A. I did, both before and since then. I have handled some
419 grade cattle for years. I generally handle black thoroughbreds. Before that I had thoroughbred short horns.

Q. How long have you been in the cattle business?

A. I was born on a farm with thoroughbred cattle; was reared there. I went to school, came back, and went on the farm again, and ever since, during my manhood, have been engaged in farming, handling fine cattle.

Q. Were you in Scotland when these animals were bought?

A. No, sir; not this herd.

Q. Where did you see it first?

A. I received them at Boston; put them in quarantine.

Q. Were you there at the time they arrived?

A. Yes; I was at Boston twelve days beforehand; went there to see the officers of quarantine. I received them at that time; loaded them onto the cars.

Q. What was the condition of the cattle when they were unloaded from the ship?

A. I stayed with Dr. Thayer, veterinary surgeon and cattle inspector in that port, who inspected all these cattle during his inspection. I saw every animal at that time, though I didn't make the inspection; he made it.

Q. You looked at them?

A. I looked at them; saw them every one.

Q. How did they appear?

A. I didn't observe one that was not in a good, sound, hearty condition.

420 Q. What was done with them?

A. They were taken off the ship, loaded on the cars, and carried to quarantine at Waltham first.

Q. Did anything happen to them on the trip out there?

A. Yes; we had a bad trip out; it was a short distance, but they didn't get on very well in the cars.

Q. Did anything happen to the cattle; if so, what?

A. My recollection is, we took one dead cow out of the cars, that was killed; one died next morning; one died that day or the day following—I am not sure. We lost three.

Q. On that trip?

A. Yes, sir.

Q. How long did the cattle remain at Waltham?

A. They were there three or four weeks, I think. I don't recollect the exact time. It has been a good while ago; some three or four weeks.

Q. Were you with them at Waltham?

A. Yes, sir; I had charge of the cattle all the time they were there. I was not there continuously. I was down to Washington once or twice during that time. I was not at Waltham. I was at Washington a few days.

Q. Did you go to Washington to see about the cattle?

A. Yes; in connection with that business.

Q. What were the accommodations for the cattle at Waltham?

A. They were not such as we thought we were entitled to;

421 not such as the law gave us; not such as we thought such cattle were entitled to. We could not give them the care we wished to give them.

Q. What was done with them eventually?

A. They were taken from there to Concord; removed to Concord; put on the farm.

Q. How far was Concord from Waltham?

A. I think Concord is ten miles from Waltham; we were about two miles out from Concord, about two miles northwest; we probably were about twelve miles from Waltham.

Q. How did they get the cattle to Concord?

A. We drove the younger bulls; we shipped some of the large bulls and heifers in cars to Concord; the others were driven by land.

Q. Were you with the cattle there when they got to Concord?

A. Yes; I helped to drive them.

Q. Do you know what was done with them after they reached there?

A. Yes, sir; put in pastures; they had plenty of water and feed.

Q. What was their condition there at Concord?

A. All in good condition; they had improved while at Waltham and were in a better condition; we had fed them liberally; we were preparing for sale; our cattle had improved all the time.

Q. How did they appear as to health?

422 A. First rate; they all walked up there nicely.

Q. Were you present at the time of their eating this Paris green?

A. No; I had returned home.

Q. Do you know how the cattle were kept at Concord?

A. Yes, sir.

Q. State if they were divided, separated.

A. The Estell and Elliott cattle were also taken to the same farm; some large bulls were put in barns, kept there by themselves; the bulls were put into barns; there was an old orchard there that Estell & Elliot had cattle in.

Q. Were the Estell & Elliott cattle with yours?

A. No, sir; they were separate from ours.

Q. Do you know where this poison was?

A. Yes, sir; I was told where it was.

Q. Do you know the place where the witnesses have stated?

A. Yes, sir; the cattle were pointed out to me, and where they got the poison.

Q. Was that poison accessible to the Estell and Elliott cattle?

A. It was not.

Q. What was there down in the neighborhood of where the Paris green was?

A. It was all a pasture.

Q. I thought there was something else.

A. It had been originally a potato patch; I can give you

423 the history; they found a little package of Paris green.

Q. You didn't see that?

A. No.

Q. When you returned did you see the thirty cattle that were reported to have eaten Paris green?

A. I saw them. I didn't recognize the thirty cattle as individuals; they were pointed out; they were back in the same lot; they were off from the rest. I could not tell them from the other cattle.

Q. Were they in good order or what was their order and condition?

A. I could not tell any difference; they were all in good condition—the cattle were.

Q. What time did you get back there—how long before you shipped the stock?

A. I think it was about two weeks after I got there before the cattle were shipped.

Q. How many of your cattle were there in the field that had had the Paris green?

A. I should think there were seventy-five or a hundred head.

Q. How many were in there when you left before the eating of the Paris green?

A. I placed seventy-five to one hundred head.

Q. How many were in there when you got back?

A. About the same number and same class of cattle.

Q. Were the Estell and Elliott cattle where they could have
424 gotten to the place where the Paris green was supposed to have been found?

A. No, sir; not within a quarter of a mile.

Q. How long were you with the cattle after you returned to Concord before the shipment West?

A. I returned, I think—I remained four or five days, then went down to Washington to get permission to bring the cattle out home. I came back to prepare for the change. I left the other members to come home with them.

Q. Can you tell how many died from the effects of the Paris green—how many cattle were missing from the shipment?

A. I know how many died at Concord.

Q. Do you know how many died at Waltham?

A. I know how many were missing out of the herd at Concord when I got back.

Q. How many?

A. Five.

Q. At the time you got there was there any evidence of any abortions amongst the cattle?

A. No, sir; none at all.

Q. Who made the arrangements for the shipment West on behalf of the railroad?

A. I don't know the initials of the gentleman—a man named Green. He was there for the railroad at that time.

Q. Did he see the cattle?

A. Yes, sir; he visited the place where they were kept two or three different times; came out to where the cattle were;
425 the day we shipped the cattle he was right there.

Q. State what knowledge he had, if any, of where the cattle came from and what their destination was and the value of the cattle.

Mr. POLLARD: I object. There is nothing to show that Mr. Green had any connection with our roads. (To witness:) Did you have a shipping contract?

A. No, sir. My recollection is it was simply a way-bill, such as we shipped cattle on ordinarily.

Q. You had something in writing?

A. I don't think I ever had anything.

Q. Whoever made the contract for the shipment?

A. No, sir; I don't remember ever to have had a paper in my possession.

Q. I don't ask about you individually.

A. I am the only one that acted. I don't know of any.

The COURT: There is no plea that any concealment was practiced as to the quality of the cattle or the condition they were in. I don't see that the testimony is material.

Mr. POLLARD: If they want to prove notice to us they must have something to show we had some connection with it. I suppose the fact is they were shipped on the Fitchburg road. Our road don't run within five hundred miles of that, and that was a contract with the Fitchburg road.

Mr. WILLIAMS: We won't insist on it. The court says it is not material. We waive it.

(Mr. WILLIAMS:)

426 Q. Mr. Leonard, I will ask you whether these cattle were peculiar. What were their peculiarities? State that.

A. They are peculiar in being very much alike, as far as that is concerned.

Q. They were a peculiar family of cattle?

A. They are a distinct breed of cattle.

Q. Are they raised generally in this country?

A. No, sir; they are a new breed introduced into this country recently, with the exception that there have been a few of the cattle in this country for years.

Q. What is the physical appearance of the cattle; anything different from others?

A. They are black and hornless.

Q. State the characteristics of the cattle.

A. They were different from any other cattle we saw in the country in this, that they were black and hornless.

Q. They left this station at what time?

A. I don't remember positively the day of the week they left. They left one night. They were loading all day and left at night.

Q. Were you there?

A. I was there helping to load.

Q. State to the jury how long that was after you came back and saw the cattle.

A. It was within a few days of two weeks.

Q. Was there anybody present at the time this stock was loaded; any surgeon or physician?

A. Yes, sir; Dr. Rose was there. He made an individual

427 examination of the cattle as they were put into the cars.

Q. Were you there with him?

A. I was with him all the time—all day.

Q. You can state to the jury what condition they were in when loaded up.

A. My own idea?

Q. Yes.
A. They were all looking first rate, every animal.
Q. Did you go with the cattle yourself?
A. No; I didn't go on the train myself.
Q. When did you next see the cattle after their shipment at Concord?
A. I overtook them on the way. I went to Chicago. I passed the cattle just, I should say, four miles probably from where the wreck occurred. I saw them on the side track as we passed.
Q. That was before the wreck or after?
A. Before the wreck.
Q. When did you see them after the wreck?
A. That was Saturday evening. I went to Chicago and got a telegram on Sunday morning on board of the train notifying me of the wreck. I learned I could go to Chicago and get back on the same train. I went to Chicago and saw the officials. They gave me a pass back. I came back and arrived at the place of the wreck the next Monday morning about six or seven o'clock, I think.
Q. State if you made any examination at that time of the cattle and what you saw—what their condition was.
428 A. When I arrived the cattle were all loaded on the cars standing on the side track.
Q. They had been gathered up and put into cars?
A. Yes, sir; all in the cars on the side track.
Q. You say you didn't see any off?
A. I mean all were aboard of the cars. We left some there.
Q. Did you see those that were left there?
A. Yes, sir; I made an examination of them.
Q. What ones did you leave there?
A. I left a yearling heifer, a three-year-old bull, and a two-year-old bull.
Q. How many heifers were killed?
A. There were four, four that were killed. I didn't see those heifers. They were missing from the herd.
Q. You didn't see those heifers?
A. No; I didn't see those at all. My recollection is I didn't see them.

(By the COURT:)

Q. How many did you leave there at Nankin?
A. We left three, to my recollection—a three-year-old bull, a two-year-old bull, and one heifer.

(By Mr. WILLIAMS:)

Q. Those were the three injured?
A. Yes, sir; I don't speak of the four killed. Four were left there dead.
Q. Do you know the value of the four heifers left there killed?
A. I know the value in this way, the average value of such cattle, the cattle of our herd.
Q. What would the average value be?

429 A. They would range, each of the cattle left, from four to six hundred dollars. We had cows worth more money; we had bulls worth more.

Q. You say that there was one heifer left there unable to come?

A. Yes, sir; there was a three-year-old bull, Banker, we left there.

Q. Explain to the jury its value compared with other bulls in the shipment.

A. We regarded him as one of the finest bulls in the herd; he would have ranked with the bull Lord William.

Q. As to his size, how did he compare with the other bulls?

A. He was larger than the average bull. That would not add to his value. That was a three-year-old bull. He was a bull of fine pedigree and fine individual merit—all taken into account.

Q. In your judgment what was Banker worth?

A. I sold a good deal worse one for a thousand dollars. I will say he was fully worth a thousand dollars.

Q. There was another bull. Was it a large bull or a small one that was left?

A. He was a two-year-old bull; a good average bull of the lot. I saw him.

Q. What was he worth?

A. Five or six hundred dollars, I should say.

(By the COURT:)

Q. What do you say was the total aggregate value of the seven head left there, two bulls and heifers?

A. These heifers were all two years old. I would say they were worth somewhere between $3,500 and $4,000.

430 (By Mr. WILLIAMS:)

Q. The whole lot?

A. Yes, sir; the whole lot; seven head.

Q. Did you stay with the animals there?

A. No, sir. I stayed with them there an hour or two; tried to get them to start up—they were on the side track. I went up to Mansfield and got in communication with the division superintendent; asked him to send our cattle ahead. The agent said he had instructions; showed me a telegram instructing him to hold the cattle there until instructed to send them. I took the passenger train to Mansfield or Marshfield and met the division superintendent—the man acting for him; the division superintendent was sick. He then ordered the cattle forward; they came forward and were fed.

Q. Did you go on with the cattle then?

A. No, sir; I went on to Chicago.

Q. When did you see the cattle next?

A. It was in the afternoon when I started for Chicago from that place. The next afternoon, somewhere about four or five o'clock, they came in Chicago.

Q. Now, when they came what became of them then?

A. They were transferred in the cars to the Chicago and Alton road.

Q. Was there any claim made at that time?

A. Yes, sir.

Q. On the railroad company?

A. I, with my brother Abiel, came there and we went to
431 the officers of the company and we demanded a settlement of damages on these cattle there.

Q. Was that before they had got out of the possession of the railroad company?

A. Before they had been transferred to the Chicago & Alton.

Q. You notified them that you claimed damages before they were transferred?

A. Yes, sir.

Q. Were they transferred with the consent of that company?

A. Yes, sir; with our consent. We consented to the proposition they made to have them transferred.

Q. They knew of the fact you claimed damages?

A. Yes, sir.

Q. What road did you ship them on?

A. On the Chicago & Alton.

Q. Were you at home when they reached there?

A. Yes; I was. I came on ahead of the cattle. I was at home when they arrived.

Q. How did you happen to send them on from Chicago? What occurred in regard to sending them on?

A. I say we made this claim for damages. They assented to a settlement, and a difficulty arose about unloading the cattle. They wished to unload them in the stock yards at Chicago. It was a season of the year when there was danger of getting Texas fever, and when they wanted to unload the cattle in those yards we objected to that. Finally they proposed if we would let them go on home and have them assessed by five or six good men and
432 send it on, they would settle it. I accepted that proposition and came on home.

Q. Did you see the cattle after they got home?

A. Yes, sir; I was at home when they were landed there.

Q. State to the jury what their condition was generally at the time they reached there.

A. It was just about as bad a lot of cattle as could be shipped. They could not be much worse.

Q. In what particular?

A. Just jammed—smashed up; that is about the whole of it.

Q. Have you had experience in shipping cattle by rail; if so, how much?

A. Yes; I have shipped cattle from one end of the country to the other—long shipments.

Q. State to the jury whether in your opinion an ordinary journey by rail would of itself injure cattle in any such way as those were when delivered at Mount Leonard.

A. No, sir; I know it would not.

Q. Where were the cattle kept after they got to Mount Leonard?

A. The bulls were taken to my place. It was night. The balance were taken to my brother's.

Q. Which brother?

A. My brother Abell. The cows were put in a pasture; not separated out, except a few of the larger bulls that were not permitted to run with the younger bulls.

Q. After that time about how long was it before they were divided?

433 A. My impression is the next day or the day following; within two or three days we divided them up; half was kept on my farm; the others were taken by my two brothers, William and Bill.

Q. There was still another division of those kept on your place?

A. No; my brother Charles and I never divided that lot of cattle as between us.

Q. I don't mean a division as a matter of ownership, but as to the place they were kept.

A. I took 50 young heifers to another place belonging to my brother Charles; they were under my supervision.

Q. How long a distance was that?

A. Six or seven miles.

Q. I want to ask you if you noticed this bull, Lord William.

A. Yes, sir; I know the bull.

Q. State what kind of a bull he was.

A. We considered him as the best bull—one of the best—in the herd; he was a very fine animal.

Q. What was his condition when he reached Mount Leonard?

A. He was injured quite seriously; one foot was badly hurt; the hoof was badly torn; we thought it would come off. We thought he was permanently——

Mr. WILLIAMS: What would that bull have been worth if he had reached Mount Leonard in good order and condition?

A. It is difficult to tell what a fancy bull is worth; it depends on what buyers happen to be present. Such a bull was readily worth a thousand dollars anywhere, to bring it in the market any time.

434 Q. What was he worth in the condition in which he was delivered to you?

A. There is another difficulty. Men don't want to buy bulls and take the chances on them getting better; it is difficult to say what he would have been worth; at that time he was not worth anything; he could not do anything; he could not perform; he was not worth anything except a man bought him on the chance of recovery.

Q. Could you put an estimate on his market value?

A. Such a bull, I think, would have brought two or three hundred dollars on the market; I think a man would have taken the chances on such a fine animal.

Q. Is there any other animal you remember particularly? I will ask you if any of them died.

A. Yes, sir; I lost on my farm seven heifers.
Q. How many?
A. Seven—that is, of these that remained on my farm; I lost seven.
Q. What were they worth or would have been worth if they had been delivered at Mount Leonard in good order and condition?
A. Worth from $400 to $600.
Q. Do you remember any other heifers now that were injured specially?
A. There was one cow broken down in the loins.
Q. What do you mean by broken down in the loins?
A. Very weak; probably didn't stand up for three months.
435 Q. What would she have been worth if she had arrived in good order and condition?
A. She was worth, in good condition, from $400 to $600.
Q. What was she worth broken down in the loins?
A. I don't think she would sell for beef or anything.
Q. That is, she was really worth nothing?
A. Yes; that was a three-year-old.
Q. Do you know about any other bulls?
A. Yes; I had one large bull, a three-year-old bull, also broken down in the loins, though he was able to crawl up and down.
Q. What kind of a bull was that?
A. A very fine bull.
Q. What breed?
A. Galloway.
Q. What would he have been worth if he had arrived in good order and condition?
The COURT: What did you say this cow was worth?
A. I think four to six hundred dollars; their prices vary; on the average, four to six hundred dollars.

(By Mr. WILLIAMS:)

Q. Do you say she was worth that in that condition?
A. No; I don't think she could have been sold at all in her present condition.
Q. That Galloway bull, do you recollect his name?
A. Yes, sir.
Q. What was his name?
A. He was a large bull. Northcote, I think, was his name.
Q. How do you say he was injured?
A. In the loins.
Q. How badly was he injured?
436 A. I kept him two years on the farm. He was never able to perform service. At the end of two years I traded him off to a neighbor—a conditional trade. He was to deliver me the calf. He said he never served. I never got anything for him.
Q. What would he have been worth if he had arrived in good order and condition?
A. I think that bull was worth $800.
Q. Any other cows you remember specially?

A. I mentioned seven cows, I think, that died.

Q. And one broken down in the loins?

A. There was one other bull badly injured. I would like to get through with those bulls.

Mr. WILLIAMS: Very well.

WITNESS: He was disposed of in the same way.

Q. What was his name?

A. I don't know his name. He was one of the younger bulls. We had a number of large bulls that were kept separate. I brought a number there.

Q. What do you say he was worth?

A. About $500.

Q. You mean if he had arrived in good condition?

A. Yes, sir; he was worth that or nothing.

Q. Do you remember any other bulls?

A. Yes, sir; I had, I think, eight. Eight bulls that were—I don't know how to describe their injuries, but just badly used up condition, and such bulls I never put them on sale; never ship them anywhere; just peddled them at any price I could get
437 for them. If I could find a man who would take one I would dispose of them. I could not individualize those bulls, any of that number—eight. We never offered them at public sale; never shipped them away from home. We just peddled them out.

Q. State whether or not they were fit for service—those bulls.

A. They were not at that time. I kept those bulls until the following spring; some of them I kept till the second spring after that.

Q. What would they have been worth if they had arrived in good order and condition?

A. They were about an average lot of bulls—about $500.

Q. What were they worth in the condition in which they arrived?

Mr. WERNER: I believe that comes in a different class. They could not particularize those.

The COURT: He may state with respect to the eight bulls. (To witness): You said there were eight?

A. Yes, sir. I don't think they were sold at all; I don't think any of them were sold at public sale.

Mr. WILLIAMS: I mean in the market?

A. In the condition they were?

Q. They could not have been sold, could they?

A. They could have been sold for fifty dollars—one hundred dollars; I couldn't say; I peddled them for what I could get for them.

Q. Any others you remember specially?

A. I believe that is all the bulls I remember.

438 Q. I will ask you, was there a special injury to a bull—you remember—a bull we had a discussion about?

A. Yes; the bull was in that lot; I remember now the bull you refer to; he had a broken penis.

Q. Was that in the lot of eight or was that additional?

A. No, sir; I don't know but what he could do as good service; I never had proof to the contrary; I never calculated any damage to that bull; he did suffer an injury, however.

Q. You say that didn't affect his value seriously?

A. I know he performed all right; he did the work of a bull.

Q. Are there any others you remember?

A. I don't think there were any other bulls that had any permanent injury; I don't recollect any; the bull Jingo did turn out to be an injured bull; he didn't develope up while in my place.

By the COURT: Was that one of the bulls in your lot?

A. Yes, sir; he was in my lot.

Mr. WILLIAMS: Jingo?

A. Yes, sir; he developed up to be a worthless bull.

Q. Where was this bull Jingo taken?

A. Taken from my place to Kingsbury's place.

Q. From there back to your brother Charles?

A. He was sold to Kingsbury; afterwards it was turned over to us.

Q. Do you know what the nature of the injury to Jingo was?

A. I never saw the injury myself.

439 Q. Do you know whether any of the cows on your place lost their calves by abortion; if so, how many?

A. Yes, sir; there were 43 head aborted on my place.

Q. These of cows alone that were on your place, and not including those on Willie's, Biel's, and Charles'?

A. On my place entirely.

Mr. POLLARD: Charles' cattle were on your place?

A. I say cattle that were on my place, and not any that were on Willie's and Biel's.

Mr. WILLIAMS: Have you in that included the fifty taken to Charles' place?

A. I have no reference to that fifty, because I don't know anything about any abortions there.

Q. How far was that from your place?

A. About seven miles, the way we went.

Q. How long after the arrival was it before the fifty head were taken there?

A. It was almost immediately. We straightened the cattle up as quickly as we could; they were sent in a very few days—maybe 3 days—two or three days after we separated them.

Q. Charles didn't live on that place?

A. No, sir.

Q. Who lived there?

A. John Altmeyer (?). He is a gentleman referred to as assisting in the assessment of damages.

Q. Do you know of any crippled cows you have not mentioned here?

A. Yes, sir; there were fifteen cows on my place that were——

Mr. WILLIAMS: Wait a moment; when you speak of 43

440 cows having aborted do you refer to any of these cows that have been mentioned by your brother?

A. No, sir; none of them; just simply those that after the division came to my place—43.

Q. How about these fifteen cows?

A. There were 15 cows just in bad condition, just badly crippled, mashed, never straightened up; we never offered them for sale.

Q. How were they injured?

A. Just how it is almost impossible to tell; just out of shape in their gate, in their mode of getting about; some of them were crippled in their feet; didn't get round right.

Q. Were they salable at all?

A. Yes, they were; they bred; these cows bred all right; I don't think a single one of these 15 I refer to were among the aborted cows.

Q. Do you know the effect of an abortion upon the market value of one of these cows?

A. Yes, sir.

Q. What is its effect on the market value of a cow?

A. It utterly destroys their value as breeding animals—utterly.

Q. What would these cows have been worth—these heifers—if they had arrived with calf, in proper order and condition?

A. I think this lot of cows were worth $500.

Q. What were they worth after having aborted their calves; what would they have sold for in the market after having aborted their calves?

A. They were yearlings and two-year-old heifers. I don't
441 know the exact price of beef; probably worth $20 to $25; not more than $35 or $40 for beef. I suppose, on average, probably, in 1883, $20 or $25; that they weighed 800 or 900 pounds—a two-year-old heifer.

Cross-Ex.

Cross-examination by Mr. POLLARD, for defendant-:

Q. You speak of 15 heifers injured?

A. Yes, sir.

Q. In what way were they injured?

A. They were injured—in the way that they were—in just a generally crippled condition. They were never presentable; were never in a condition we could put them in a public sale. If a man were in any of these sales to put in objectionable stock it would depreciate the whole of the stock he offered. We have never taken such cattle as were lame and were weak in the loins; not able to serve them or bring calves.

Q. They were the worst injured of the heifers?

A. Not the worst injured. Some were so injured they were utterly worthless for breeding purposes. These cows in their outward appearance were injured greater; were apparently in a worse condition than those that aborted.

Q. Did that 15 head have calves?

A. Yes, sir; I think every one of those cows were breeders.

Q. So it didn't injure their breeding quality?

A. No, sir; I don't think it did.

Q. After that you enumerated certain of the bulls. You spoke of eight bulls. Do you mean that there were eight more than you had spoken of before?

442 A. Yes, sir; I think I had enumerated about three—Lord William, Northcote; then a two-year old bull; possibly one other; possibly a fourth bull; then eight besides.

Q. Then eight besides?

A. Yes, sir.

Q. Lord William was sold at Kansas City?

A. Yes, sir.

Q. Northcote—what became of him?

A. My recollection is I traded him to a neighbor, a man living in the county. He never performed any service afterwards. I never got anything for him.

Q. In relation to these aborted animals, does that 43 head include any abortions that happened on your place before the division?

A. No, sir; there was nothing happened on my place of that kind that I know of.

Q. Were the cattle taken from your place anywhere?

A. The bulls were taken to my place; the females were taken to my brother's.

Q. Does it include anything that happened on Abiel's place?

A. No; these were abortions that happened to cattle that fell to me and my brother Charles in the division; after they were divided and put on my place.

Q. Do you know anything about 50 or 57 head that were taken to Charles' place, of your own knowledge?

A. Not of any abortions; nothing. I don't know a thing about that; nothing of any abortions among those.

Q. Now, in relation to these you have spoken of on your

443 own place, when was it the first one came to your actual knowledge?

A. Well, it began immediately after their arrival, almost, after the division; within two or three days after their arrival at home.

Q. Did it commence before the cattle were divided?

A. No, sir; I say immediately after the division, and two or three days after their arrival home.

Q. So far as your knowledge is concerned, there were no abortions until after the cattle were divided?

A. Yes, sir; I saw — on my brother's place. I called his attention first to an Angus cow referred to, in the front lawn of his house. I spoke to him of the fact; called his attention to that abortion first.

Q. That was before?

A. Yes; that is not in my lot of cows.

Q. I was not asking about your place. Is that the only one you knew of before the division?

A. I understood you to be asking about cattle on my place. If I didn't answer correctly I beg pardon.

Q. You answer now.

WITNESS: I say I did see that one abortion at my brother's. I may have seen others.

Q. Was there any other one than this before the division?

A. I don't know; this is the only one I saw myself.

Q. Your place adjoins Abiel's?

A. There is a road between us—a county road between us.

Q. The cattle were simply taken across the road to your place in the division?

444 A. Yes, sir; they were taken across to my place. We divided them on my place.

Q. How long after they were taken onto your place did you discover any abortions?

A. I think it was within a day or two; almost immediately after. It might have been the next day; it may have been two days after, but almost immediately.

Q. What animal was that?

A. I don't know, sir.

Q. Do you know the name of the animal?

A. I cannot give it. I had three hundred cows. I could not remember every name. If I wanted the name I could have got it.

Q. Did you not keep a memorandum or record?

A. I did.

Q. Where is it?

A. I have not got it.

Q. Where is it?

A. It is burned now.

Q. Where?

A. It is destroyed now.

Q. When was it destroyed?

A. Destroyed last September a year ago.

Q. How?

A. By a fire that occurred at my house.

Q. Did the house burn down?

A. Yes, sir.

Q. Destroyed this with it?

A. Destroyed this with it; yes, sir.

Q. That being gone, you have no way of knowing?

A. No, sir; I have no way of knowing now the names of the cows. I could probably identify most of those cows from the fact I know where we sold them.

445 Q. After a cow had aborted in the herd and the evidence of her abortion had disappeared could you pick that cow out again?

A. Yes, sir; I have one hundred head on my place. I know every individual on my place as well as I know my boys.

Q. Didn't you testify on the other trial you could not do that?

A. I don't think I did.

Q. Didn't you testify there was no means of knowing after that evidence had disappeared?

A. No, sir.

Q. That you could not identify that cow in any way but by taking her up?

A. No, sir; it is not possible, I think, for me to have testified in any such way. I do know my cattle individually.

Q. Didn't you say just a moment ago that with two or three hundred head of stock it would be impossible?

A. I didn't say that. I said I cannot give the names. If I wanted the name I could have got it. I could have got the name by seeing the number. I knew the cows individually.

Q. Where was the first cow you saw abort?

A. My cows were placed in five different pastures, I think; to my recollection my cows were in five pastures, and I would not be positive where the first abortion occurred, whether in the one immediately south of my barn or south of my orchard. I remember it is the pasture that runs towards the barn; that was the pasture in which the first abortion occurred.

Q. Did you discover it yourself?

446 A. I believe the first found was found by myself.

Q. How old a calf would you judge it to be?

A. It was very small; it had no hair on it; probably not larger than a cat.

Q. Could you form an opinion?

A. No; I could not do it. I don't know of the effects of different periods of gestation.

Q. Whether it was two months or three months?

A. I should say more than two months. I should think three or four months. I don't know just how quickly they do develope.

Q. Do you know what became of that particular cow?

A. I know what became of all——

Mr. POLLARD: That particular cow?

A. No; I don't know what particular cow it was.

Q. How many men were on your place in charge of those cattle or taking care of them?

A. I think possibly I had about three or four; John Cunningham was one. I think I had two or three other Scotchmen till after that sale.

Q. You think you had three or four men?

A. I think up to that time I had three or four men.

Q. When and where was the next one?

A. Possibly it was just where the other one was. I don't know the place.

Q. You don't know?

A. I didn't make a memorandum; I didn't put down any memorandum of the place where it occurred.

447 Q. Can you remember about the character of the fœtus—the calf?

A. No, sir; I don't know. They were of all sizes and periods of gestation.

Q. Do you remember what cow that was?

A. No, sir; I could not tell; I cannot give the name of a single cow that aborted a calf.

Q. What became of her?

A. I don't know that I looked at that time to find out a single cow. I had the means of identifying by name any cow I wished to identify. I had no occasion to do it.

Q. Could you tell now what became of that cow?

A. No, sir; not that individual cow; I don't care to know where it is.

Q. You cannot do it?

A. Not now; have no occasion.

Q. Now, you say the same is the fact as to all the cows that aborted?

A. I could not tell where a single individual aborted cow went. I know where they altogether went.

Q. I will ask you to tell where they all went, if you can.

A. I can in this way: For instance, I went to Denver with seven of these aborted cows; I sold them in connection with five of my brother William's to a gentleman named Cornforth. I know seven of those aborted cows were sold to him; I don't know which they were. I probably, by going to the pedigree furnished to Cornforth, could find out the different cows.

Q. I want to know if you can identify any particular cow. Can't you tell what seven those were of those aborted cows?

448 A. I know every aborted cow on my place. They are a most provoking thing; they come round every three weeks to let you know they are there; they are eternally bulling; you cannot forget them; you may know well a cow and never remember the name.

Q. I have not asked you about the name; I asked you about the individual cow.

A. I just say I did know the individual cow in the pasture as an aborted cow, with a pedigree to it. I knew the individual cow then, but I don't know it now.

Q. When did you take cattle to Denver?

A. I think it was the spring of 1885; I am not positive; I think it was the spring of 1885. It was during the session of the legislature there. My brother testified it was the spring of the year. I think it was 1885.

Q. Did you attempt to breed those cattle after they aborted?

A. Yes, sir; that was kept up all the time regularly; as often as they came in heat they were bred.

Q. After you found the cattle to abort you put them to the bull again?

A. Yes, sir.

Q. The same bull was put to other cows?

A. Yes, sir; we bred different bulls; we didn't use the same bull; we used a number of bulls on our farm.

Q. You didn't make any distinction; you put the bulls indiscriminately to cows which aborted?

A. I didn't make any distinction between aborted cows and those that didn't.

449 Q. You say you made none?

A. No, sir.

Q. Did you treat these cows in any way or separate them from the others?

A. No; didn't separate them; I don't believe there is any treatment for aborted cows.

Q. What did you do with the calves that were born?

A. The calves that were born were frequently very small; the hogs were running in the pasture; they ate them; when we found them we put them out of the way—buried them; put them away anywhere.

Q. In the lot?

A. Where it was most convenient to keep them away from the cattle; I didn't let them lie round in the herd; we would take them out of the lot or bury them.

Q. Do you mean you saw all the fœtuses?

A. No, sir; I didn't see them all.

Q. How many did you see?

A. I don't remember that I ever kept count of that.

Q. Can't you give an idea?

A. I have seen 25, or might be 30; I saw a large number.

Q. What evidence had you of the abortions of the cows?

A. Just the evidence a cow gives; there is no mistaking the evidence of an aborted cow.

Q. What was the general size of those calves that you saw?

A. They varied; different sizes.

Q. What was the smallest?

A. I don't think I ever saw any much smaller than a cat; about that size; most of these cows were to calve in the spring; almost all were in calf when they landed at quarantine; they were to
450 calf the next spring; the generality of them would calf the next April some time.

Q. You have no means of knowing that they were all in calf, have you?

A. Yes, sir; I have pretty good means of knowing.

Q. What is it?

A. I was with the cows all the time; when cows do not come in heat nine times out of ten—99 in a hundred—they are in calf. Our rule is to breed them when they come in heat.

Q. You don't know whether they were all in calf at quarantine?

A. No; I would say we bred half of those cows during that period in quarantine; that is the way we did; as to the certainty of a cow being in calf, I would not make oath that any number of cows were in calf; they might not be; you can't be generally certain about that matter.

Q. You have stated in relation to those seven sold at Denver; what did you get for those?

A. Twelve—seven of mine and five of my brother William—sold for $1,900 at Denver.

Mr. WILLIAMS: Did you state when that was?

A. I think it was the spring of 1885; I am not positive about it

being in the spring; I know it was when the legislature was in session there; I think it was 1885.

Mr. POLLARD: Do you know where the rest of them went?

A. Yes, sir; six of them I kept on my farm—that is, two or three were returned, were sold, and were returned to my farm;
451 they were in calf, and were carrying; they aborted their calves; they were returned to my farm; two of them I have there to-day.

Mr. WILLIAMS: How many do you say came back?

A. Six.

Q. They were not in the Denver cattle?

A. No; not in the Denver cattle.

The COURT: You say they were sold and came back?

A. Sold and came back. They were sold on a guarantee as breeders.

(By Mr. POLLARD:)

Q. What were they sold for?

A. For breeding cows.

Q. How much did you sell them for?

A. I remember now we refunded money to a man. I know what that was; that was two years ago; refunded him the money for a cow sold for $350. I thought she would breed; sold her that way.

Q. You sold the whole six as breeding cows?

A. I sold them at different times; not together.

Q. They were all sold for breeding purposes? You knew they had aborted?

A. They were cows, Mr. Pollard, we thought had got on all right again and would breed.

Q. You knew they had aborted?

A. Yes, sir; we knew they had aborted.

Q. Did you represent that to the purchaser?

A. No, sir; I don't think I did. The fact is I didn't know at the time—at the beginning of this matter—I didn't know very much about abortions. I didn't know they were liable to repeat themselves.

452 Q. You sold them for how much a head? You have stated one.

A. I don't remember what they were sold for; they were returned; two I returned other cows for.

Q. Did you guarantee them?

A. I just say this: At public sales we never guarantee that; we have always made good every——

Mr. POLLARD: I am not asking you about public sales.

A. At our sales we always made good barren cows or bulls not fertile. I never give a guarantee.

Q. I ask if you guaranteed these to be breeding cows?

A. No; I didn't give a verbal guarantee.

Q. Did you give a written guarantee?

A. No, sir; not a written guarantee.

Q. Why do you say you didn't give a verbal guarantee?

A. We are known all over the country, and men do know we do make good cows. There is an implied guarantee goes with every animal we sell.

Q. That she is a breeder?

A. Yes; unless we tell a man it is not guaranteed or not warranted.

Q. What became of the rest of them?

A. Twenty, I know, went to Montana.

Q. Who took them there?

A. Mr. Hancock. I didn't go with them myself.

Q. Were they sent by themselves or with other cattle?

A. They were sent with some other cattle. There were 32 of these non-breeding cows; part were my brother Willie's. There
453 were six bulls. I sent with the same lot five or six bulls.

Q. We have been speaking about your cattle.

A. There were just 20 of my own cows.

Q. They were all of these aborted?

A. Yes; all of them.

Q. What did they bring?

A. They didn't bring a red cent.

Q. How did that happen?

A. I can tell just what they went for. They were traded for Texas ponies or Oregon ponies. I sent the ponies to Tennessee. The whole thing brought me in debt; that is the way it came out.

Q. What did you get for them?

A. Got Oregon ponies.

Q. How many?

A. For the 32 head of cattle, including 20 of mine, we got forty ponies.

Q. What did you send them out for?

A. To get them out of the way.

Q. Did you send them out to sell them as breeders?

A. No, sir. We sold them just exactly as they were. They were sold without a guarantee; we stated plainly we would not guarantee them to be breeders.

Q. You sent them to be sold as breeders?

A. We sent them——

Mr. POLLARD: Not as beef cattle?

A. Sold them as females—cows; possibly they would breed. I didn't know.

Q. You sent them as breeders, not as beef cattle?

A. No; we didn't send them to a beef market. I can say that.

Q. What became of the balance?

A. I believe that is all.

454 Q. How long did those animals continue to abort after they commenced, or what was the last one?

A. Three or four months.

Q. That would bring it into December or January?

A. I don't remember. I cannot say exactly the length of time. I remember one cow that was threatened with it; finally she went

through. It continued for three or four months. I would like to make an inquiry. I believe I said that was all of those cows. I believe I have not accounted for them. I believe there were ten cows I have mentioned—ten aborted cows—that became regular breeders.

Q. Sir?

A. Ten of the 43 aborted cows became regular breeders. If I have not mentioned that I failed to account for all. I don't know whether I mentioned that or not. I know ten became regular breeders afterwards.

The COURT: Seven went to Denver; six, you say, were sold and came back to you; that makes thirteen; twenty you sent to Montana—33—and ten became regular breeders?

A. Became regular breeders. I don't know whether I mentioned that.

Mr. POLLARD: About the six that were returned. I have understood that you said six were sold?

A. Yes, sir.

Q. And were returned to you?

A. Yes, sir; sold and returned.

Q. What became of them?

A. Two are on my farm; two of them died, seemed to be
455 diseased, never recovered from the effects of the abortion.

Q. Were they not apparently all right when you sold them?

A. Yes, sir; but the second abortion seems to have been a serious damage to them; they finally died. I could not testify to just what they did die of.

Q. What do you mean by the second abortion?

A. After I sold them they aborted again.

Q. When was that—when did they come back?

A. One I sold at Wichita was sold in the spring of 1884. She came back in the fall of 1885 and I have her.

Q. How long did you keep her?

A. That cow is there now, a non-breeder.

Q. How many of them are there now?

A. Two are now on the farm.

Q. This is one?

A. This is one.

Q. Has she ever bred since she came back?

A. No.

Q. What do you keep her for?

A. I have been fattening her to sell her.

Q. Since 1885?

A. No, sir; she came back in the fall of 1885. I didn't feed her last winter at all. She brought a calf once. I cannot speak well of the other. She is weakly.

Q. You say she has had a calf since?

A. No, sir.

Q. What did you say?

A. I said she hadn't brought a calf.

Q. And the other one?
A. She is about dead now; she is utterly worthless; she dwindled away till she is very nearly dead; she is not fit for beef or anything; she is taken care of.
456 Q. Has she ever had a calf since you got her back?
A. No, sir.
Q. Was she in good order when you got her back?
A. No, sir; she was not in good order then.
Q. And the other four?
A. Two died on the farm; two were sold for beef.
Q. That disposes of the six?
A. Yes, sir.

Redirect.

Redirect examination by Mr. WILLIAMS, for plaintiffs:

Q. How long did you keep those ten you say became regular breeders before they brought calves?
A. I think they caught on immediately after the abortions. I think they came on all right. In breeding these aborted cows I didn't breed them immediately after the abortions. I didn't breed them promptly. Ordinarily they were kept a few months out and then bred. I think these ten promptly went back to breeding again. That is my recollection.
Q. These animals that were sold at Denver. How long was that after you had——
WITNESS: They were sold in Denver in the spring of 1885.
Q. You paid all the expenses of taking them there—delivering them there?
A. Yes, sir; paid the expenses of feeding and keeping them up at that time.
Q. What was the condition of the market in the spring of 1884 and subsequent thereto as compared with its condition in the fall of 1883 for black cattle?
A. I believe it was 30 per cent. lower in the spring of 1884
457 than it was in the fall of 1883.
Q. How was it after 1884? Did it go down or improve after that spring?
A. It went down; has been going down ever since.
Q. When these cattle were brought down to your place were they kept separate from the other cattle on your farm?
A. I had other cattle on my farm. Some of these cattle were in the same pasture. They were kept together in the same pasture.
Q. Were there any abortions in the other cattle not in the wreck?
A. No, sir; I never had an abortion in the herd.
Q. They were with these cattle?
A. Yes, sir.

(By Mr. POLLARD:)

Q. Those cattle, were they kept with these cattle at all?
A. Yes, sir. Some were probably in the same stable with them.

Q. You mean some of the Baltimore shipment?

A. No, sir; cattle I had on my farm previous to that. I didn't have the Baltimore shipment; my interest in that went to Brother Charles' farm.

Q. They were the same kind of cattle?

A. The same kind of cattle, imported in 1882.

Q. How many did you have running with these?

A. I think I had somewhere about 20 or 25 females, the same breed.

Plaintiffs rest.

458 *Testimony on the Part of the Defendant.*

Counsel for defendant then offered and read in evidence the depositions of O. H. Ayers, Louis Pomeroy, Thomas H. Beall, John J. Schumaker:

O. H. Ayres.

Deposition of O. H. Ayres, a witness on behalf of the defendant, taken before Sylvester Price, a notary public in and for the county of Crawford, State of Ohio, at the office of J. W. Coulter, in the city of Galion, in said county and State, in the presence of Mr. Cosgrove, as counsel for plaintiffs, and L. A. Russell, with J. W. Coulter, as counsel for defendants.

OMER H. AYRES, of lawful age, being by me first duly sworn, as hereinafter certified, deposes and says as follows:

(By Mr. RUSSELL:)

Q. State your name, age, residence, and occupation.

A. My name is O. H. Ayers; I am twenty-nine years old; I am a conductor on the Western division of the Chicago & Atlantic; I live in Huntington, Indiana.

Q. How long have you been engaged on the Chicago & Atlantic road as a conductor?

A. Since a year ago the 3rd of last May.

Q. State whether some time in September last you had charge of a train of live stock, Scotch cattle, bound West?

A. Yes, sir; I did, on the 18th of September.

459 Q. State whether you understand this train-load of live stock to have been a train of live stock that had been in a wreck at Nankin previous to that time.

A. I did understand that they had a wreck on the N. Y., P. & O., but at what place I don't know.

Q. Where did you take charge of this train?

A. At Huntington, Indiana.

Q. How far west is Huntington, Indiana, from Nankin, Ohio?

A. That I could not say. It is 127 miles west of Marion.

Q. Marion is the eastern terminus of the Chicago & Atlantic, is it not?

A. Yes, sir.

Q. At what time did you take charge of this train-load of cattle at Huntington?

A. We left there at 4.20 in the morning of the 18th of September, 1883.

Q. Do you know at what time that train had arrived at Huntington?

A. I do not think it was there over thirty minutes, because I came there and I took the numbers just as soon as I got out. I do not think it was there over thirty minutes.

Q. Your run began at Huntington and went west that day?

A. Yes, sir.

Q. What was the run next east of yours?

A. From Marion to Huntington.

Q. What at that time was the ordinary running time of freight trains—how many miles did they make an hour—live-stock trains?

A. On the Western division?

Q. Yes.

460 A. From ten to eleven hours—ten to twelve hours, making the division 138 miles.

Q. Do you know what the current running time of freight trains was on the Eastern division?

A. I do not.

Q. How many car-loads of cattle were in your train?

A. Thirty-one cars.

Q. Do you know how many cattle there were?

A. I do not.

Q. Do you know about what the average number of cattle per car was?

A. From twelve to fourteen head.

Q. What kind of cattle were these?

A. That I could not say.

Q. Were they American cattle or foreign cattle?

A. They were foreign cattle. They were small black cattle, with no horns, and I was told that they were Galloway and Angus Polander cattle.

Q. Polled Angus, I guess.

A. Polled Angus, or something of that sort, but I don't know anything about what they were; only I had drovers with me, and all I know about it is what they said.

Q. If you remember, how many drovers were with that train of cattle?

A. I think there were five drovers and the boss. I don't know what his name was. I knew at the time, but I have forgotten now. I think he had five Scotchmen with him.

Q. State whether these men took charge of or had charge of the cattle while they were on your train.

A. They did; yes, sir.

461 Q. Now state what, if anything, you observed in regard to the condition of those cattle or any of them—as to whether

you observed or did not observe that any of those cattle were in an injured condition or not.

A. I did not observe that any of them were injured in any way at all. I looked them over—looked them over as I took the number of the train, and then, of course, I was over the train several times. I did not see that any of them was in any way injured—anything of the sort.

Q. State whether any statement or complaint was made to you during the time the train of cattle was in your charge by the boss or any of his men that had them in charge in regard to the condidition of any of the cattle in the train.

Plaintiffs' counsel objects to anything said by any person in regard to the accident that had previously occurred.

A. There was no statement of anything of that kind made. The boss that had them in charge told me that they were in a wreck on the N. Y., P. & O., and that there was two or three, I think he said, were killed of the cattle, and that was all. He did not make any statement to me, nor I did not ask him anything, because it was none of my business.

Q. My question was whether any statement was made to you by any of those men in the line of complaints of the condition of the cattle that you had on the train.

A. No, sir; there was not.

Q. Was your attention by them called to any creature that was by them said to be injured?

A. Not any.

462 Q. When you got the train at Huntington on the morning of the 18th, won't you describe with particularity what condition the cars were in as to feed and water facilities, and all about the feed and water?

A. The cars were Pittsburgh and New York, Lake Erie & Western cars, except three. Three were these patent New York live-stock express cars. These were in the rear end of the train. Each car had chopped feed and hay in the car and a sort of a hogshead with water in it, except these three live-stock cars, and I stopped at Monterey, fifty-six miles west of Huntington, where we take coal, and watered the stock in those three cars, and the men in charge told me there was water enough in the other cars, so that I need not bother with putting water in those barrels, and the men, after it came daylight—well, it was nearly daylight when we left there, 4.20—not quite, though—and after about six o'clock the men went out and commenced to feed the cattle and also water them, and they were working in the cars most of the way to Chicago, feeding the cattle and taking care of them—looking after them.

Q. You state that in all of your thirty-one cars of stock, except these three special live-stock cars, there were barrels of water?

A. Yes, sir.

Q. How were these barrels situated, with reference to the possibility of each animal getting water?

463 A. Why, they were not where they could get at them at all. They were watered by the men with pails.

Q. The men would take water in pails from the stock of water in the barrels and carry it to each creature?

A. Yes, sir.

Q. The three special cars had for each creature a special drinking trough or place?

A. Those stock cars are made with stalls. Each creature had a stall by himself, and they are watered from the top of the car—pipes running right around the side of the car and running down to a small trough—running each side of the car.

Q. Before each creature?

A. Before each creature; yes, sir.

Q. And at Monterey, fifty-six miles west of Huntington, at the tank, you caused those troughs for those creatures in each of those three cars to be filled with water?

A. Yes, sir.

Q. How was the feed provided for these cattle and where from and by whom?

A. It was in the cars when I took the train. I know nothing of where it was got from or anything about it.

Q. In each of the cars?

A. Yes, sir.

Q. Was there in your train a special car-load of feed?

A. No, sir; there was a car-load of baggage—was all. They said it was baggage. The car was sealed. I had nothing to do with the car whatever. They said it was a car-load of baggage belonging to the men. It was a box car. It was sealed up. I had
464 nothing to do with it—no bill of it or anything of the sort.

Testimony as to conversation objected to as incompetent.

Q. Where did you see feed that the cattle had?

A. Why, I saw it all along the line.

Q. In the cars with the cattle?

A. Yes, sir; except in those three cars. Their water is up on the top of the car, in a box. Each side of the running-board there is a box.

Q. Was there or was there not feed in those boxes?

A. There was feed in those boxes; yes, sir.

Q. Where in the other cars did you see feed?

A. In the center of the car.

Q. In what shape was it?

A. There were boxes with chopped feed in and hay on the floor.

Q. Was it or was it not true of each of the other cars except these three cars that they each of them had chopped feed and hay in the center of them?

A. I think most of them did.

Q. How much did you notice in regard to that?

A. I noticed that when I was passing the train. I saw them taking out with pails this chopped feed.

Q. And distributing it to each creature?

A. Distributing it to the cattle; yes, sir.

Q. Was any complaint made to you by the men who had the cattle in charge in regard to feed—any complaint that they had not feed for them?

A. No, sir.

Q. Where and when did you deliver your train?

A. I delivered the train at 51st street, Chicago, at 2.10 in the afternoon.

465 Q. Of the 19th or the 18th?

A. Of the 18th.

Q. Was that at a stock yard?

A. It is at the Chicago & Atlantic regular freight yards.

Q. Is there any stock yard there?

A. No, sir. There is a stock yard about a half a mile from there—delivering stock yard.

Q. Had you any knowledge of the train or any knowledge of what was done with it after you left it at 51st street?

A. No, sir.

Q. State what, if anything, you observed in regard to any of these cars in your train, as to whether they had any new troughs or any new boxes in them for feed or for water. What kind of cars were they; were they rack cars?

A. Rack cars; yes, sir; all of them except these three live-stock cars.

Q. Were they cars that apparently before that time had been used for the transportation of live stock?

A. Yes, sir.

Q. State if you observed anything of any new construction or any new provision for feed or water in any of those cars.

A. No, sir; I did not; nothing more than the boxes which contained the feed; that was all.

Q. Which had been set in?

A. Which had been set in there; yes; and also barrels which had been set in there for water.

Q. State whether, if any request had been made of you to provide water or stop for water, there was any convenience on your run where water could have been gotten for the filling of these barrels, if it had been necessary.

466 A. Yes, sir; at any water-tank.

Q. State whether any of these cars that you had in your train were in bad order or in a wrecked condition.

A. No, sir.

Q. Or whether they were in good condition.

Objected to as leading.

A. They were in good condition, so far as I saw.

Q. State what the condition *on* the cars in your train was—each and all of them.

A. The cars were all in good condition—good running order.

Cross-examination by Mr. COSGROVE:

Q. You say you took charge of this train at Huntington, Ind.?

A. Yes, sir.

Q. About what hour of the day or night?

A. 4.20 in the morning.

Q. Was it a bright night?

A. It is so long ago I do not remember.

Q. Could you see the cattle in the cars; did you go along to each car and look in?

A. I took my numbers by lamp-light; but it was soon daylight.

Q. How far did you run before you made a stop?

A. Sixteen miles.

Q. How long did you stop then?

A. Just long enough to get water; about three or four minutes, probably.

Q. How long did you run the next time before you stopped?

A. The next time we ran about two miles, to a railroad crossing; the next time about a mile and a half, to another railroad crossing. The next time we ran twenty miles, to a water-tank and another railroad crossing together.

467

Q. How long did you stop at that railroad crossing?

A. About five minutes; then sixteen miles.

Q. How long did you stop there?

A. I could not say. We stopped long enough to get coal and water the cattle. We were probably there thirty minutes.

Q. Did you get any water for the cattle again until you got to Chicago?

A. No, sir; we did not; only watered them once.

Q. What was the longest stop you made at any time after that before you reached Chicago?

A. About ten minutes.

Q. What part of the train were you in during the trip from Huntington to Chicago, the principal part of the time?

A. I was all over the train. I was in the caboose part of the time, and I was over the train; on the head end and on the hind end and on top of the train.

Q. Principally in the caboose?

A. No, sir; rode out most of the way. It was a nice day, I remember. After daylight it was a pleasant day, and I rode on top of the train a great deal of the time, as I generally do.

Q. Were the cars closed on top?

A. Yes, sir; some of them have trap-doors, probably two feet square on the top, that raise up.

Q. Did you go down into the cars?

A. No, sir.

Q. Passing along on top of the cars, back and forth, you could not see the cattle beneath you, could you?

A. Not very well, only as I saw them through the end; that was

all. Where I saw the cattle was in walking on the ground
468 beside the train.

Q. How many times did you do that?

A. Three or four times.

Q. From there to Chicago?

A. From Huntington to Chicago; yes, sir.

Q. Do I understand you to say that there were thirty-one car-loads of those cattle?

A. Thirty-one.

Q. About how many head of cattle in each car?

A. I should think about fourteen.

Q. How long did the train remain at Huntington after it reached there before you left—after it came in your charge?

A. I think about thirty minutes. Just long enough for me to take the numbers and the galvanizers to look the train over and to change cabooses; that was all.

Q. What did you say about galvanizers?

A. Galvanizers always look the train over.

Q. What is their vocation and calling?

A. Car-inspectors. When a train comes into a terminal station they always look it over to see if there is any hot wheels or anything broken or anything of that kind.

Q. All I understand you did was to make your record, so that you would know what cars came into your possession at that time?

A. Yes.

Q. And as soon as that was done you started out?

A. Yes.

Q. And it was about four o'clock in the morning?

A. About 4.20.

Q. So that it got there about 3.50?

A. It must have got there about 3.50.

469 Q. You had to use your lamp, I understand, to get the numbers of the cars?

A. Yes, sir.

Q. Were there any cattle in your train other than these Scotch cattle or foreign cattle?

A. No, sir.

Q. Was there not a load of calves in that train?

A. They were all small cattle; I could not say whether they were calves or not.

Q. Was there not a load of American cattle in that train?

A. No, sir; there was not.

Q. You are sure of that?

A. I am sure of it. If there was, I did not see them.

Q. Thirty-one cars of cattle, all, as you understood and now understand, Scotch cattle or imported stock?

A. Yes, sir.

Q. Do you know to whom these cattle were consigned?

A. No, sir; I do not. I knew at the time. I do not remember now.

Q. Were they all consigned to the same or different parties?

A. I could not say.

Q. I will ask you if there was not a load of cattle in that train consigned to parties other than Messrs. Leonard or Estill & Elliott.

A. I could not say. That is out of my line, to keep any track of anything of that kind. Of course, after a train is out of my hands, why, that is all there is of it.

Q. You say you talked with some man, the foreman of the stock. Do you know who he was?

A. I do not.

Q. You say he appeared to be the manager of all the cattle on that train?

A. He did; yes, sir.

Redirect examination:

Q. What was the condition of each of the cars in your
470 train as to the number of cattle in it, with reference to the question whether each creature had or had not a sufficiency of room for safe riding?

A. As far as I saw, they all seemed to have room enough. They were not crowded at all.

Q. Is that statement true of each and every car in your train?

A. Yes, sir.

Q. Let me ask you whether, during the time that you had that train in charge, anything occurred that could in any way have injured any of the cattle.

Objected to as leading.

A. No, sir; there did not.

Q. State what condition you delivered the cattle in with reference to the condition you received them in.

A. I delivered them in good condition—the same as I took them, so far as I know.

Recross-Ex.

Recross-examination:

Q. What business are you engaged in now?

A. I am conductor on the Chicago & Atlantic.

Q. Is the New York, Lake Erie & Western running that road now?

A. That I could not say.

Q. The same management that there was a year ago?

A. The same management we had a year ago, I suppose. H. J. Jewett is president, and the same management, I suppose.

Q. I understand you to say that the cattle, so far as you know, were in as good condition when you delivered them at Chicago as they were when they came into your possession at Huntington?

A. Yes, sir.

(Signed) O. H. AYERS.

Sworn to before me by said Omer H. Ayers and by him
471 subscribed in my presence this 10th day of September, 1884.
[L. S.] SYLVESTER PRICE,
Notary Public.

Lewis Pomeroy.

Deposition of Lewis Pomeroy, a witness on the part and behalf of the defendant-, taken before Sylvester Price, a notary public in and for the county of Crawford, State of Ohio, at the office of J. W. Coulter, in the city of Galion, in said county and State, in the presence of Mr. Cosgrove, as counsel for plaintiffs, and L. A. Russell, with J. W. Coulter, as counsel for defendant.

LEWIS POMEROY, of lawful age, being by me first duly sworn, as hereinafter certified, deposes and says as follows:

By Mr. RUSSELL:

Q. State your name, age, residence, and occupation.

A. Lewis Pomeroy. I am twenty-six years old the 24th of this month; Huntington, Indiana, is my residence; I am braking for Mr. Ayers on the Chicago & Atlantic road.

Q. State what you were engaged at in September of last year.

A. Braking.

Q. For whom and where?

A. For Mr. Ayers, on the Western division of the Chicago & Atlantic.

Q. State whether you remember the occasion of taking a train-load of live stock from Huntington West in September of last year.

A. Yes, sir.

Q. Do you remember what day in September it was?

A. It was on the 18th of September.

Q. Can you tell how many cars of cattle there were and what kind of cattle they were?

A. There were thirty-one cars. I cannot tell what kind they were.

472 Q. Can you tell what they looked like?

A. I know they were black, without horns.

Q. How were they as to size?

A. Small.

Q. Did you understand at the time whether they were American cattle or imported cattle?

A. I heard them say that they were imported cattle.

Q. Did you hear from what place they were imported?

A. Scotland.

Q. How much did you see of the cattle?

A. I saw them three or four times over the division as I passed by the train—back and forth down the train.

Q. What brakeman were you—that is, what was your position on the train?

A. I was hind brakeman.

Q. What persons were there with the train other than your regular trainmen?

A. There was six persons with the train.

Q. Who were they?

A. I don't know. They was men that was with the cattle to take care of the cattle.

Q. Were these men Americans or foreigners?

A. I couldn't say; I did not talk with any of them at all.

Q. What were these men engaged at during the time you were with the cattle train?

A. They was engaged at taking care of the cattle.

Q. What did they do in regard to taking care of the cattle?

A. Why, feeding them, watering them.

Q. Describe exactly how they fed them and how they watered them—where they got the food and where they got the water.

473 A. I could not say that.

Q. Where was their food or water upon the train?

A. I don't know.

Q. Did you see any water or any food upon the train or before the cattle or with the cattle?

A. I saw a box and a barrel in each car.

Q. Where in each car did this box and barrel stand?

A. About the middle of the car.

Q. Did you at any time see into any of these boxes or barrels?

A. No, sir.

Q. Did not get up into a car at any time?

A. No, sir.

Q. As far as you observed what was the condition of those cattle in the train?

A. Why, they was in good condition, as far as I observed.

Q. What was the condition of the cars as to whether they were overloaded or overcrowded or as to whether each creature had room enough for its safe transport?

A. I don't know; I did not notice that particularly.

Q. Did you see any of the creatures down or cast or in any way in trouble?

A. No, sir.

Q. Did you hear or did you not hear any statement by those in charge of the cattle that any of them were down or in bad condition?

A. No, sir.

Q. Do you or do you not remember stopping at any place for the purpose of watering any of the cattle?

A. I remember of stopping at Monterey to water and coal.

Q. What was the process of watering them at Monterey; how was that done?

A. A water tank; we watered three cars there.

474 Q. How was that done; by letting the water from the water tank run into the troughs of those cars?

A. From the top of the cars; yes.

Q. Did you observe at the same time anything being done in re-

gard to watering the cattle in the other cars, or at any time during that trip did you see any of these men engaged in watering any of the cattle in the other cars?

A. Yes, sir; I did.

Q. When you saw that being done how was it done; where did they get their water and how did they carry it to the creatures?

A. They got it out of the barrel in the car in pails; watered them in pails.

Q. The man that watered the cattle getting his water out of the barrel and carrying it to the cattle in a pail?

A. Yes, sir.

Q. He being at the time in the car?

A. Yes, sir.

Q. State where that train was delivered, as far as you were concerned.

A. It was delivered at 51st street, Chicago.

Q. Do you remember at what time of the day?

A. About 3.50.

Q. Of what day?

A. Of the 18th.

Q. The same day that you had taken them?

A. Yes, sir.

Q. Do you remember what time in the morning you took them at Huntington?

A. 4.20.

Q. What condition were the cattle in when you delivered them at 51st street, Chicago, that afternoon, as far as you know, with reference to the condition in which you had received them in the morning?

A. They was in first-class condition, as far as I know.

475 Q. State whether or not anything occurred during the trip that could in any way, as far as you know, have injured any of the cattle.

A. There did not; no, sir.

Q. Have you any knowledge of any failure to provide them during that trip with food and water?

A. No, sir.

Q. What condition were the cars themselves in?

A. They was in good condition, as far as I know.

Q. Did you observe anything wrong in the condition of any of the cars?

A. No, sir.

Q. Did you see any hay in any of the cars?

A. Yes, sir.

Q. Was it baled hay or loose hay?

A. I could not say that. I saw some loose hay laying in the car on the floor.

Q. Do you remember whether you saw it in one or in more than one car?

A. Yes, sir; I saw it in more than one car.

Q. Did you or did you not see any of the hay before any of the cattle where the cattle could get at it?

A. I could not say.

Q. Did you see any other kind of feed besides hay?

A. I did not.

Cross-Ex.

Cross-examination by Mr. COSGROVE:

Q. You say that there were thirty-one car-loads of cattle?

A. Yes, sir.

Q. Was there an extra car of baggage also?

A. There was an extra box car.

Q. That made thirty-two cars besides the caboose in that train?

A. Yes, sir.

476 Q. I will ask you if there was not an elderly man there that had some cattle in that train.

A. I don't recollect.

Q. How long have you been brakeman on this road?

A. I commenced a year ago the 11th of last June.

Q. And have been in the employ of the road ever since?

A. Yes, sir.

Q. And still are?

A. Yes, sir.

Q. You have been running on the division west of Huntington, between Huntington, Indiana, and Chicago?

A. From Huntington to Chicago; yes, sir.

Q. When you and the conductor took charge of the train that morning you were not inspecting the cattle particularly, were you? You were attending to your business as brakesman?

A. Yes.

Q. You say you saw barrels and boxes in those cars?

A. Yes, sir.

Q. Do you know of your own knowledge whether there was anything in them or not?

A. I saw the men getting water out of the barrels and watering the cattle.

Q. I understand you to say that the thirty-one car-loads were all black cattle, polled—that is, without horns?

A. Yes, sir.

Q. You are quite sure of that?

A. Yes.

Q. How many cars received water from the tank when you stopped?

A. Three cars.

Q. Then the other twenty-eight cars received no water at all?

A. No, sir.

477 Q. How did you come to put water in those three cars and not in the others?

A. I don't know; we put it in. That is all I know about it.

Q. Were you running on regular time or were you an extra train that day?

A. I don't remember.

Q. This train did not reach Huntington on its regular time, did it?

A. I don't remember.

Q. You are not able to state whether you were running as a special on regular time or running wild?

A. I am not able to state; no, sir.

Q. Were you delayed any length of time in consequence of meeting other trains?

A. No, sir.

Q. Were you side-tracked any?

A. I don't remember it.

(Signed) LEWIS POMEROY.

Sworn to before me by said Lewis Pomeroy and by him subscribed in my presence this 10th day of September, 1884.

SYLVESTER PRICE,

[L. S.] *Notary Public.*

Thos. H. B. Beale.

Deposition of Thos. H. B. Beale, a witness on the part and behalf of defendant, taken before Sylvester Price, a notary public in and for the county of Crawford, State of Ohio, at the office of J. W. Coulter, in the city of Galion, in said State and county, in the presence of Mr. Cosgrove, as counsel for plaintiffs, and L. A. Russell, with J. W. Coulter, as counsel for defendant.

THOMAS H. B. BEALE, of lawful age, being by me first duly sworn, as hereinafter certified, deposes and says as follows:

(By Mr. RUSSELL:)

Q. What is your age?

A. Forty-six.

Q. Where do you live?

A. In Marion, Ohio.

478 Q. What is your business and occupation?

A. Agent for the New York, Lake Erie & Western and C. & A. railroads.

Q. What was your business in September of last year?

A. The same occupation.

Q. I wish you would state, giving time, condition, and facts, as far as you know them, in regard to these imported Scotch cattle that were wrecked at Nankin, Ohio. Give all the facts from beginning to end, as far as you know them, in your own way.

A. On the 16th day of September, 1883, there was twelve car-loads of the imported cattle arrived at Marion about noon. The C. & A. engine was ready to take them out on the C. & A. road, but by request of the men who accompanied the stock they wished to remain there until the balance of it should arrive, and they wished to water

and feed their stock, and we had a switch-engine got out and run up and filled their barrels with water and gave them all the assistance we could, and the stock remained there until Monday afternoon, the 17th of September, when the balance came in eighteen car-loads; arrived there about 4.15, I think; and as soon as the train could be got ready they left Marion, between, I think, six and seven o'clock that evening. Our record shows six o'clock, but I think it was a little after that before they got started out; sent it all out on one train. The last lot, the eighteen lot, I did not see
479 at all. I was at the upper depot. Our depots are about a mile apart. The first twelve cars I saw as I was standing on the platform, giving orders to the men in regard to watering them. I did not look inside of the cars at all, only just as they passed by the platform.

Q. The twelve cars which arrived first were held in Marion from about Sunday noon till six or seven o'clock in the evening of Monday, the 17th?

A. Yes, sir.

Q. The eighteen cars which came later arrived in Marion about four o'clock in the afternoon of the 17th?

A. Yes, sir.

Q. The two sets of cars, twelve and eighteen, were in Marion consolidated into one train?

A. Yes, sir.

Q. Sent forward as a train of thirty cars?

A. Yes, sir.

Q. What other cars were sent forward with those cars?

A. I think there was one other car of calves went west with them; that was a separate lot; they were not consigned to the same parties nor from the same point.

Q. What other cars besides this car-load of calves went forward?

A. I think that was all.

Q. You think there were thirty cars of these cattle and one car of calves?

A. Yes, sir; making thirty-one cars of cattle altogether and the caboose.

Q. With the caboose making thirty-two in the whole train?

A. Yes, sir.

Q. You say the twelve cars that came first were detained there at the request of the men who accompanied the cattle?

A. Yes, sir; there was two men with them.

480 Q. With the twelve cars?

A. With the twelve cars; yes, sir.

Q. How soon after those twelve cars arrived were they provided with water?

A. Right away; within an hour after they arrived; just as soon as our passenger train, No. 12, went past we took them out from the side track and prepared to give them water.

Q. You said something about barrels. Won't you more particularly describe where the barrels were in the cars?

A. I think they stood right up to the side of the car at the door.

Q. A barrel in each car?

A. I think there was a barrel in each car.

Q. What size barrel?

A. I don't remember; quite large, though; probably hold a number of pails; larger than our common barrel; probably as large as a hogshead or tierce.

Q. Were they vessels that were specially made for that use?

A. That is more than I could tell; I did not examine them very closely.

Q. What do you know about the feed of the cattle?

A. They had feed with them.

Q. In each car?

A. They had it, I think, distributed in each car; and they had a coal car, I think, of feed that came with the last lot—the eighteen cars—and that was put into the caboose; I think they had some feed, though, in bags in the train.

Q. What was this feed—chopped feed or grain?

A. That I don't remember.

Q. Did you see any hay?

481 A. I don't remember about the hay.

Q. Do you know anything in regard to what took place about feeding and watering these eighteen car-loads that arrived there at four o'clock Monday afternoon?

A. That I don't know. I was at the upper depot. Our yardman below had orders to give them all the facilities they wanted to water.

Q. Do you know how many men came with the eighteen cars of cattle?

A. No, sir.

Q. Was there any statement or observation or request made to you by the men in charge of the cattle, except this request to hold the twelve cars until the other cars should arrive?

A. All the request I know of was what the two men made who came with the twelve cars.

Q. They wanted to wait there at Marion until the others should come up?

A. Until the others arrived.

Q. Was any application made to you for opportunities to feed or water other than what you have stated?

A. The gentlemen who were with the first twelve cars are the only ones that made any request; their requests were all granted. The yardmen, the men about the depot there, assisted them all they could.

Q. Did you notice closely enough to be able to say in regard to any of those twelve cars whether the cattle in them were in good or ill condition.

A. That I could not say.

Q. Did you notice anything in regard to the condition of the twelve cars?

A. The twelve cars apparently, by looking at them, appeared to

be in good condition, so far as I could see as they were passing along the platform.

482 Q. Did you from any source acquire any information that any of these twelve cars were in ill condition?

A. No, sir; the cars were all inspected there by inspectors on both sides.

Q. Marion is an inspecting point?

A. Yes, sir; it is an inspecting point.

Q. And the cars are inspected by inspectors of both roads?

A. The cars delivered to the C. & A. are inspected by the C. & A. and repaired by the N. Y., P. & O. The cars going in a contrary direction are inspected by the N. Y., P. & O. men and repaired by the C. & A. men. No cars are allowed to pass unless they are in good running condition.

Q. Were any of those twelve cars set out, or was any transferring done at Marion?

A. No, sir; not at Marion; neither the twelve-car lot nor the eighteen-car lot.

Q. Did this car-load of calves that went from Marion come in with the eighteen cars?

A. That I can't say, but I think they did. I would not say positively in regard to that.

Q. Do you know whether the eighteen cars that came in Monday afternoon were or were not supplied with water before they left Marion?

A. That I could not say positively, and I did not think of asking the question before I left; but if they needed water they were supplied with water, because they had positive instructions to give them water if they needed it.

Q. And there were facilities there for supplying water?

A. The facilities were all right for supplying water without any delay.

483 Q. Did you go up to Nankin at all?

A. No, sir.

Q. Do you know anything in regard to any facts at Nankin?

A. No, sir; I do not.

Q. How far east of Marion is Nankin?

A. I should judge it was in the neighborhood of forty miles.

Q. What is the division of the N. Y., P. & O. road this side of Marion?

A. There is a division between Kent and Galion, and Marion, in some respects, to Galion is considered a division.

Q. That is, for the live-stock run?

A. For the live-stock runs for the East.

Q. It is an unusual thing, I suppose, to take live stock to the West, is it not?

A. Yes, sir—that is, in car-loads. Usually they start from Marion and run east to Kent.

Q. How many miles is that?

A. That is 121 miles, I think; in that neighborhood.

Q. And for some purposes of operation the division is between Galion and Marion?

A. Yes, sir.

Q. What is the length of that division?

A. About twenty miles.

Q. Nankin, then, is still east of Galion?

A. Still east of Galion. I think it is about forty miles.

Q. That would make it in the neighborhood of sixty miles east of Marion?

A. Yes; it probably may not be that far by five miles—five or six.

Q. Do you know whether this twelve-car train that came in first to Marion had made its run from Nankin direct or not?

A. That I could not say.

Q. And you do not know, perhaps, whether the eighteen cars came direct from Nankin to Galion?

484 A. No, sir; I do not.

Q. What is the customary duty of an engine bound west from Marion with loaded cars on the C. & A.? How many cars do they generally take?

A. It varies from thirty to forty-five cars.

Q. What is the customary load of loaded cars in trains coming into Marion from the East on the N. Y., P. & O.?

A. That varies. From Galion to Marion they sometimes haul thirty-five or forty loads.

Q. How many if they come from further east on the N. Y., P. & O.?

A. I don't know what they haul from Kent here. I don't know what their average train-loads are.

Q. What is the usual practice at Marion in regard to making up trains for the West? Do you generally consolidate trains?

A. Yes, sir; trains are all made up by the yardmen for the trains going West.

Q. Then it is not usual, if I understand you rightly, to take the train on West in just the condition that it comes into Marion?

A. No, sir; a great many of those cars that come in from the East going West are condemned, have repairs to be made, and frequently there is only fifteen or sixteen; it varies from twenty-five sometimes down as low as five coming in at a time.

Q. So that your regular practice is to consolidate in Marion for the West?

A. Yes, sir.

Q. Did you observe anything in regard to the condition of these eighteen cars that came in?

A. No, sir; I did not see them.

Cross-Ex.

Cross-examination by Mr. COSGROVE:

485 Q. You say that one of those men in charge of that train of twelve cars requested that they be retained there until the others came up?

A. Yes, sir.

Q. To whom was that request made?

A. That was made to me personally. I was talking with the man personally when they came in.

Q. Are you the superintendent of the road?

A. I am the agent of the road at Marion—of both roads, the N. Y., P. & O. and the C. & A.; have the general supervision of the business there.

Q. Do trains leave and remain there on your order?

A. No, sir.

Q. Would not that train have remained there whether that request had been made or not?

A. No, sir.

Q. It would have gone forward, wouldn't it?

A. They wanted to send it, but by the request of the men to remain there the order was countermanded. The superintendent of the C. & A. wanted to send them out.

Q. And then he countermanded the order?

A. He countermanded the order. We telegraphed him the desire of the men to remain there until the other should arrive.

Q. Was not the C. & A. saved the expense of sending two trains over the road by that?

A. That I could not say.

Q. They did send all the cars in one train?

A. They did; yes, sir. They probably would have filled out with other cars. They generally have other cars to fill out with.

Q. Empties?

A. Empties and loaded.

Q. There were thirty loads of cattle, you say?

A. Thirty loads of cattle. Thirty-one cars went out on that train.

Q. Thirty of these imported cattle?

A. Yes, and a car of calves.

486 Q. Did that box car go out also?

A. There was no box car in the train that I know of.

Q. You say the yardmen had directions to give them water and whatever they wanted?

—. ——.

Q. Do you know whether those orders were carried out or not of your own knowledge?

A. I never heard anything to the contrary.

Q. You gave the orders yourself?

A. I gave the orders myself; yes, sir.

Q. And that is all you know about it?

A. Yes, sir. The first twelve cars I know were watered under my own supervision. I was right there at the depot when it was done.

Q. The next division or section of the train had eighteen cars of these black cattle, you say?

A. Yes, sir.

Q. You do not know whether the load of calves was in the train containing the eighteen cars or in the train containing the twelve cars?

A. Of course they did not come in with the twelve or they would have gone out before. I think they came in and were left with the eighteen cars that were left.

Q. And the eighteen reached there when?

A. About four o'clock—four or a quarter past four in the afternoon of Monday, the 17th.

Q. The others reached there when?

A. About noon of the 16th, on Sunday.

Q. You say it is about sixty miles from that point east to Nankin?

A. I think it is in that neighborhood.

Q. What is the length of time usually occupied in running a train from Nankin to Marion?

487 A. I should suppose in the neighborhood of four hours.

(Signed) THOS. H. B. BEALE.

Sworn to before me and subscribed in my presence by the said Thomas H. B. Beale this 10th day of September, 1884.

SYLVESTER PRICE,

[L. S.] *Notary Public.*

J. J. Shoemaker.

Deposition of John J. Shoemaker, a witness on the part and behalf of the defendant, taken before Sylvester Price, a notary public in and for the county of Crawford, State of Ohio, at the office of J. W. Coulter, in the city of Galion, in said county and State, in the presence of Mr. Cosgrove, as counsel for plaintiffs, and L. A. Russell, with J. W. Coulter, as counsel for defendants.

SEPTEMBER 10TH, 1884—2 p. m.

JOHN J. SHOEMAKER, of lawful age, being by me first duly affirmed, as hereinafter certified, deposes and says as follows:

Q. How old are you?

A. I am forty-one, past.

Q. Where do you live?

A. I live in Orange township, Ashland county.

Q. Near to what station on the N. Y., P. & O. road?

A. Nankin.

Q. What is your occupation?

A. Farmer.

Q. Did you live near Nankin station and were you a farmer in September of last year?

A. Yes, sir.

Q. About how far from the station is your farm?

A. A trifle over a half a mile.

Q. After the wreck of some imported cattle at or near Nankin station on the 16th of September of last year, what was the

488 first that you knew of that accident happening; how soon were you there?

A. The morning of the 16th; the first I knew anything of it was

between eight and nine o'clock in the morning, by seeing it. That was the first I knew of it.

Q. This was Sunday morning?

A. Sunday morning.

Q. You went, then, up to the place where the wreck had occurred?

A. Yes, sir; went right up to it.

Q. Where, at that time, were the cattle?

A. At that time, between eight and nine o'clock, the cattle was tied along the railroad fence.

Q. What kind of cattle were tied there?

A. Bulls were tied there that I noticed, and there were quite a number of heifers out in a lot or field on the south side of the railroad track.

Q. The first field adjoining the railroad's right of way?

A. Yes; right up next to the track.

Q. The bulls were tied to the fence on the railroad's right of way?

A. Yes; all along the fence. There were quite a number of them tied there. The heifers were loose.

Q. Do you know how many?

A. I wouldn't give you the number.

Q. Either of the bulls tied or the heifers in the field?

A. Neither one. I did not count them, so I couldn't give no number.

Q. What was the condition of that field where the heifers were as to having water in it?

A. There was running water there, a plenty, flowing from a spring—spring water—running out of Mr. Tobias's woods. It runs down through there, plenty of it.

489 Q. How was the water as to being sufficient to water all the cattle that were there?

A. There was enough to water all that went there, I guess, for all that I know. We have always water there.

Q. And there was water there then?

A. Yes, sir.

Q. In plenty for the stock that was there?

A. In plenty. And also there was water in the woods, that went from the field into the woods. Mr. Mason's woods that was. The field opened into the woods, and in the northwest corner of the woods there was plenty of nice clear water there for any stock to drink; any stock could drink it if they wanted.

Q. How was it in regard to there being water on the railroad's right of way anywhere near where the bulls were tied?

A. The water had to pass off through under the railroad. It goes across the railroad on down.

Q. How far was this water on the railroad's right of way from the place where the bulls were tied—how far would they have to be moved to get them to running water on the railroad's right of way?

A. I could not just exactly tell you that. It was not a very far distance. I could not give you the distance, but it was only a short distance for that purpose.

Q. Would it be as much as a half a mile?

A. Oh, no, it was not a half of that, or a fourth of it. I did not take particular notice of that. I don't understand where that water comes out of the woods through the fields and comes down
490 under the railroad. If it was on the east side of the tank, I don't think it was over—I would be safe to say in my guesswork it would not be over five or ten rods.

Q. Was there anything in the way between where these bulls were tied and where the water was on the railroad's right of way to prevent leading stock to the water?

A. That I don't know.

Q. Don't know whether it was a convenient place to lead them there or not?

A. I could not tell you that particular. That wreck was there, and was throwed off right at that side, but I don't think there was anything but what they could get by if they wanted water.

Q. What do you know about cattle in any field on the other side of the railroad track?

A. That I don't know.

Q. This side that you speak of was the south side?

A. Was the south side of the track where I lived. I went right down there to see the wreck in the afternoon. I saw the cattle; stopped and looked at them as I went down. On the north side I did not notice them.

Q. Don't know anything about the stock on the north side?

A. No; I don't know.

Q. What do you know about there being some in cars there at the same time, Sunday morning?

A. There was some cars loaded with cattle. The cars were all right, as far as I could see. The cars was not bursted or broken up. I think the cattle stayed in.

Q. Do you know how many such cars there were?

A. No; I could not tell you that.

491 Q. But you know there were some cars standing there?

A. Some cars standing.

Q. Apparently all right?

A. Apparently all right, as far as I could see.

Q. With cattle in them?

A. With cattle in.

Q. Did you keep or take charge of any cattle that were there since then?

A. Yes, sir.

Q. When did you get them and what cattle were they?

A. I got a bull and a heifer. I took them on the 20th day of September.

Q. From whom did you get them?

A. Mr. Edgar.

Q. Mr. Edgar is the station agent at Nankin?

A. Yes, sir.

Q. He gave into your custody a bull and a heifer?

A. Yes, sir.

Q. Do you know what other cattle besides this bull and heifer were left there in a crippled condition?

A. There is one bull left there yet.

Q. There were three crippled cattle left there at Nankin?

A. Yes, sir; there were three crippled cattle left there.

Q. Do you know how many cattle were killed in that wreck?

A. Yes, sir.

Q. How many?

A. Four.

Q. What were they?

A. Heifers.

Q. Are you able to state what the ages of those heifers were?

A. No, sir; I could not. I did not go up to them to look. I just saw them laying there.

Q. Of the two bulls that were left there crippled, was the one that you got the older or the younger one?

A. The oldest one.

492 Q. Carefully describe his condition when you got him, and then describe his condition now.

A. When I got him it was all he could do to walk to my place from the station. He was a good while going. I won't give you the time, for I don't — mind how long it was.

Q. So crippled that it was a slow process?

A. Slow travelling, and he was pretty badly jammed up when he came there. At the time I took him down there I did not know what was the matter with his hip; it was swollen, and I attended to it. And he also had a bad front knee; that was bruised, and I attended to that.

Q. Which hip was it that was injured?

A. The right hind hip.

Q. And which knee?

A. The left forward knee.

Q. That, you say, was badly bruised?

A. Yes, sir.

Q. What other jams did he have about him?

A. Well, he was naturally what I would claim a stiffened-up bull; apparently was stiff all over.

Q. Badly bruised up?

A. Yes, sir.

Q. What was the condition of his shoulders?

A. I think his shoulders was jammed by a fall, being heavy. He was sore, probably.

Q. How long did soreness show and continue in the shoulders?

A. The soreness in his front shoulders, it seemed like that he is kind of stiff in them all the time.

Q. Till now?

A. Yes, until now. One shoulder seems like he was a little stiff in it yet, but it may be that it is on account of not exercising. I don't give him as much exercise as I would——

493 Q. At all events, he does not seem yet to be entirely relieved of soreness or stiffness in his shoulder?

A. In his front shoulder. He don't seem anything like that.

Q. How has his knee gotten on?

A. His knee has gotten right sound, I should say. You can't notice anything in his knee now.

Q. What is the condition of his hip?

A. He is lame in that yet.

Q. Are you able to tell yet whether his hip was broken or dislocated?

A. No, sir; I could not tell either one. We never was with him to see. I can't tell that.

Q. Can you tell by the manner of his walk and the manner of his action?

A. Every time he steps it would move up like that (indicating)—every time he stepped his weight on it. He has done that ever since, but not as much; that makes me think his hip in that place is a little thrown out of place. I don't think it is broke, because if it had been broke I don't think he could have supported his weight on that at all. He did do that all the time.

Q. Since you have had that bull has he done any service in the way of getting calves on cows?

Objected to as incompetent.

A. Yes, sir.

Q. Have you preserved any record of the times and occasions of his service?

A. Yes, I have.

Q. Please state them.

A. The first cow he served was on the 5th day of February, 1884; the second the 23rd of May, and the third one on the 9th of June; that was all.

Q. Whose were those cows?

494 A. There was two of them mine and one of them was one of my neighbor's.

Q. Which two were yours?

A. The two first ones.

Q. What has been the result of that service?

A. The result is, I suppose, they will have calves, if nothing comes across the cows.

Q. Have you examined the cows in regard to that, so that you are able to state whether they are positively with calf or not?

A. I have the one. I am sure of that one.

Q. The one that was served first?

A. Yes.

Q. That is one of your own cows?

A. Yes, sir.

Q. And do you know her to be with calf?

A. I know her to be with calf.

Q. Do you know whether from the time of the service of this bull or at any time before the service of this bull she had any opportunity to get to any other bull or not?

A. She had not.

Q. How is it in regard to the second of your own cows? What do you know in regard to her condition?

A. The only thing that I can give, if she was not with calf from the time that I have given and up till now—if they had not been with calf, why, they would make some signs of spreeing again; that is the reason why I think the others are with calf.

Q. Have you observed this one enough to state whether she has come yet to her time?

A. Yes; she has not come around yet. Her time will be up in November, I think.

Q. You have observed her, I understand, with reference to her spreeing?

495 A. The first one, now, understand, I have taken her by feeling the weight of the calf like on the outside; by punching with the thumb in you can feel the calf. Anybody can do it that understands it. The others I have not examined in that way, but the way I have done that is, that if they were not with calf they would have been spreeing before this time. They generally go from two to three weeks before they get with calf.

Q. Have you observed these cows carefully enough to know by that sign that they are with calf?

A. Yes, sir; I have watched that pretty close. I wanted to make sure of it.

Q. Do you feel confident that these other two cows are also with calf?

A. Oh, I think they are, without there is something that would happen to come around that I don't know of—get a hurt that I don't know of.

Q. But you believe them to be with calf from the service of that bull?

A. Yes; my opinion is that they are with calf.

Q. What about this heifer; has she had a calf since you got her?

A. Yes, sir.

Q. When did she have her calf?

A. The 2nd of December, 1883.

Q. How is it in regard to her since that time? Have you put her to this bull?

A. The first time she was a spreeing I took her down to Tobias's bull.

Q. That is, to this foreign bull that Mr. Tobias has in his custody?

A. Yes. I won't give you the date of it, for I did not set that down. It was either the last of January or the first of February of

496 this year that I took her down there.

Q. Did you put her to Mr. Tobias's bull?

A. Yes. Well, I did not; my boys drove her down.

Q. You sent her down to that bull?

A. I sent her down. I did not see anything of that.

Q. Did you understand that she was put to that bull?

Objected to.

A. The boys said that she was.

Objected to.

Q. After she came back from Mr. Tobias's did you yourself put her to this older bull?

A. Yes, sir. I don't know just exactly the date, for I did not set that down. I thought she was railroad stock and they would find it out. She was with the bull. I saw him at that time. Through carelessness and neglect I did not set it down at that time.

Q. Do you know whether the bull you have custody of did serve the heifer?

A. Yes, sir; I saw him.

Q. What do you know with regard to her, whether she is with calf again or not?

A. The only signs, as I said before, if she had not been with calf she would have been spreeing before this time.

Q. And she has not been spreeing?

A. She has not been.

Q. I do not understand you, that this railroad heifer, as you call her, is one of the three of which you set down the time of service.

A. She is one of the three that I have not set down. I have not put her down, because I thought she was railroad stock.

Q. She is one outside of the three you have set down—two of your own?

A. Two of my own and one of my neighbor's, and she makes the third one.

497 Q. Three of your own?

A. Yes; I have three of my own, then. I have specified two of my own and one of my neighbor's, and then this railroad heifer is in addition to that. I did not make any minute, because, as I said, she was railroad stock.

Q. In your opinion, is this heifer now with calf?

A. According to my opinion she is with calf.

Q. Have you any means of judging whether she is with calf from the service you saw from this old bull or from the service she got at Mr. Tobias's place?

A. The only means that I would have, she took this bull last. That would be the only reason.

Q. You know positively of this last and don't know of your own knowledge of the first service?

A. No, sir.

Q. Won't you describe with some particularity how this old bull that is in your custody succeeds in mounting a cow with his hip in that condition? In the first place, did you give him any opportunity before this earliest date that you have got down?

A. I gave him once before a cow that was come around, and I let her in where he was. That was before the 5th day of February. I won't give you the date of it, for I don't know. I let her in, and he would not make any attempt to do anything. He would appear to be willing enough, only he would not make the attempt to raise or

to mount her. It seemed like the soreness was too great for him to undertake that.

Q. But he did show the sign of desiring to have connection with her?

A. Yes; appeared to be willing enough every other way. He was unable at that time.

498 Q. Now describe how he made his successful mount the first time, in February of 1884. What precaution did you take to enable him to succeed?

A. Well, the way that I had the cattle there I kept them there, and, thinks I, "Now is my opportunity." The cow was coming around. If there was any possibility in any shape I wanted one from him. I had the opportunity from this other one, that I knew; but I wanted one from this one that I had. I got the cow and took hold of her and held the cow steady, so that after he got ready to mount her, if he would jump against her or anything like that, I could hold her so that she would not get away from him. I held her on purpose, so that she would not get away, and he got up and served her twice in that way, and that was the last, and she has proved to be with calf.

Q. In these subsequent acts of service have any such extra precautions been necessary, or has he been successful in doing it without additional or unusual help?

A. Why, the other two that I have, I hadn't to do anything with him. With my neighbor's cow we done the same thing again.

Q. Held her?

A. Held her, on account about the time that he would touch her she would jump out, and he ain't supple enough to follow her up, and the caution was then for to save him, so that he would not be hurt himself. Not to hurt him was what we was cautioning.

499 Q. Then, in regard to your neighbor's cow, you held her and took the same precautions?

A. Yes, sir.

Q. How was it with these other cows of your own?

A. The other two, we did not do that; they stood.

Q. They stood and he waited on himself?

A. Yes, sir; helped himself.

Q. What condition was the heifer in when you got her?

A. Why, she had a cut on the one half of her right hind foot, on the inside right above the hoof or right at the hoof; it was cut clear in to the bone. You could see the bone right plain when I took her down there.

Q. Had she apparently any other injuries besides that?

A. That was all that I doctored her for—was that sore.

Q. Did you see any other injuries or bruises or wounds?

A. I did not; no, sir.

Q. What condition is that wound in by this time?

A. It has all healed over and got well.

Q. Has the hoof grown off?

A. The hoof has grown clear off and another new one on; it ain't quite as far out as the other one is.

Q. Is she lame on that foot?

A. She is not now; she was when I got her.

Q. When the hoof has grown out to the full length, what do you say as to the condition of that foot as compared with the original condition before she was hurt?

A. Why, I don't see but what she is just as well as she ever was as far as I can see, if I am any judge about it.

Q. Is the calf still living?

A. Yes, sir.

Q. What is the calf?

A. It is a bull calf.

Q. What is its condition?

500 A. It is in good living condition.

Q. Was there any unusual performance about her bearing the calf?

A. No, sir; her labor was very easy.

Q. Was the calf pretty soon able to stand, as soon as ordinary in such circumstances?

A. No; the calf did not get up for two hours or such a matter afterwards.

Q. When it got up did it get up itself or by assistance?

A. I guess I helped it up, if I ain't mistaken. I got it up before that and got it so it would suck the cow, and then I went away and didn't get it up till about between twelve and one.

Q. How is it since that time; has it thriven ordinarily?

A. It has got along as well as any calf could, as far as I know.

Q. How far is your place from the railroad station?

A. It is a trifle over a half a mile.

Q. When you were there in the morning of Sunday did you see any feed?

A. Several places I seen a couple of sacks of corn-meal, I suppose it was. I seen several sacks laying alongside of the railroad there. I won't give you the number, for I did not count them and I don't know as I could tell the number.

Q. Do you know the difference between polled Angus cattle and Galloway cattle?

A. I did not know it until after I had them there. I don't know as I could tell it, only what they told me.

Q. Have you made any investigation since that on that subject?

A. No, sir.

501 Q. You do not know, then, whether these cattle that you have are polled Angus or Galloway?

A. Only what I have got from others—that is, the agent who is there. One of the men was there and described it to us—told us the difference; that is all that I can tell.

Q. You have not yourself any knowledge on that subject?

A. I have got no knowledge at all; I have not read any; I never had seen any until I saw these.

Q. Are you able to say as to this heifer whether she is a good milker or not? Give a description as to that.

A. I could not do that, for I have not milked her out clean since

she had a calf—since I have had her; I let the calf have all she could give, with few exceptions. When I thought it did not take it all, then afterwards I milked her out, and then a few times through the winter I milked her out—that is, partly.

Q. Not so that you can form any notion as to the amount of milk she would give or as to her character as a milker?

A. I could not tell you anything at all about that.

Q. You let the calf have all it wanted except when you say she needed it, and then you cleaned her out?

A. Yes.

Q. At the time you went to that wreck was the engine of the rear train there?

A. The way I understand, there was only one train there when I went down.

Q. That was the train that had run into the other one?

A. The one that had run into the other one. The engine was upset on the side of the road; that was there; that was the only one I saw; and then, of course, some cattle cars.

502 Q. That is the engine I would describe as on the rear train?

A. Yes; that is what I understood you.

Q. Are you able to say whether those cars of cattle you saw there at that time had been in the rear train or in the forward train?

A. That I could not tell you.

Q. Is there any side track at this place?

A. Yes, sir.

Q. Did this wreck occur on the side track or on the main track?

A. By the looks of the engine I would take it that it occurred on the side track, for the engine was laying over on the north side of the track—over next to the fence.

Q. Were these cars that you saw standing with cattle in them back of the engine or ahead of it?

A. They were standing at the east end—back of it.

Q. As to the number of those cars you have no memory?

A. I have no memory.

Cross-Ex.

Cross-examination by Mr. COSGROVE:

Q. You say you are a farmer?

A. Yes, sir.

Q. How many cows have you?

A. I have three of my own, and my aunt that I am living with has two.

Q. You have five on the place, then?

A. Five on the place; six with this railroad heifer.

Q. Do you let this bull run with the cows?

A. He ran about a month with them.

Q. Then what did you do with him?

A. I have kept him up since that and before that.

Q. What is your idea of the weight of that bull when you first saw him?

A. I am no judge; I would only make a guess of it. I
503 would not make it down to be facts in the case; only just by the looks, and, from what I have seen other bulls weighed, I should judge he would weigh about 1,600 or maybe a little upwards.

Q. What will he *way* now, in your judgment?

A. Well, that is what I think. I don't think he would go far from that either time. I don't think he has lost or gained much.

Q. He is, then, in good flesh, you think, now?

A. He is in medium; it's nothing to brag of.

Q. You say you had three cows of your own, and your aunt had how many, two?

A. Two. I gave them in as my cows, all of them, understand me, because they are on the place.

Q. You have bred one of those cows to this bull, you say?

A. I have bred one and then two others.

Q. Were the other two your aunt's?

A. No, sir; one my neighbor's, one is mine, and one is my aunt's.

Q. Why didn't you breed the rest of your cows to him—the other three?

A. I have—to Mr. Tobias's bull.

Q. You preferred Tobias's, then?

A. No, sir.

Q. Why didn't you breed them all to this bull?

A. The reason why was I thought he was too heavy for the other two.

Q. How old were the other two?

A. One is three years old this spring, and the other one is middling old but a small cow.

Q. How old is this railroad heifer?

A. I don't know her age, only what they told me.

504 Q. From your judgment?

A. I judge from that she was two years old.

Q. Did you breed her to this bull since she had a calf?

A. Yes, sir; I have.

Q. She is two years old, you judge?

A. That is when she came there, understand me.

Q. Two years old in the fall of 1883?

A. I don't know whether she was two years old in the fall or in the spring. If we have mulley cows we have nothing to go by; we judge cows in that neighborhood by their horns. I am not posted on that.

Q. These two cows that you did not breed to this bull, are they larger or smaller than the other two cows that he served?

A. Smaller than the ones he served first. Them that he had first was the largest cattle, and these other two were smaller.

Q. Two of the cows that you bred to him you say that you held so that he could serve them?

A. Yes; there was two of them that was bred to him that was held.

Q. If I understood you correctly, you stated that you held him because he was not sprightly enough to follow them in case they moved?

A. That is so. He could not make the step and also the mount together on his hind feet.

Q. In other words, if he was reared up so that he had his fore parts on her if the cow should start he could not follow her?

A. Then he could. This was, understand, to do that. The
505 cow would get from under him before he would come down onto her. In fact, he did not come down. He had to kind of brace himself up against the cow to get up. That was the first time.

Q. Then he would not rise right up on his own volition?

A. No, sir; he would not raise himself square up.

Q. He had to sort of raise himself by bracing against the cow?

A. The first time.

Q. Do you think he would be in good condition to turn out with fifty or a hundred cows to breed from now?

A. That is more than I can tell you, for I never kept a bull in my life till I had these, and I could not tell you anything about that.

Q. He has only served three cows since you have had him?

A. Yes; I think it is three.

Q. Two of those were held. How about the other one—was she held, too?

A. No, sir; she was not.

Q. Did you see him serve her?

A. Yes, sir; I seen him serve her.

Q. Where was she?

A. In the barn yard.

Q. Was he tied?

A. No, sir.

Q. Up against the fence?

A. She was up to the fence like.

Q. Had her head against the fence?

A. Had her head in the corner, way.

Q. And he braced up against her?

A. Yes, sir.

Q. She could not very well get away from him, then, unless she turned, could she?

A. Oh, she could have whirled around and got away.

Q. Do you keep him up now or let him run?

A. I am keeping him up.

506 Q. Keeping him in the stable?

A. Yes, sir.

Q. Tied up?

A. Tied up.

Q. Why don't you let him run?

A. I will give my reasons for that. He is very large, and he is heavy, and he is kind of itchy; wants to rub when he is out, and

he is rubbing the fence, and that inclines to throw it out of its place and throws it down. I am afraid some time maybe he will throw it down into my barn yard and let my other stock into the corn-field. Then there is another thing. I think I can keep him just as cheap by keeping him up as I can by letting him run in the grass, for the grass is pretty scarce now.

Q. You regard him as a pretty valuable animal, do you—that is, for breeding purposes?

A. I have not made any remarks about that. I could not tell you anything about it. These cattle was something that was new to me. I don't know the wealth of them and don't know anything about it. If it was something we was used to we might say something about that; but it is something I don't know nothing at all about. I don't know what they was valued at nor nothing at all about it.

Q. If the bull was capable of serving cows like a perfect bull why should you keep him up and only let him serve three cows during one season?

A. The reason I kept him up was what I told you, and he served three cows. That took all the cows that I had.

Q. Are there no other cows in the neighborhood?

507 A. Well, they thought the price was a little too big.

Q. How much do you charge?

A. They thought they would charge five dollars for the use of the bull, but they have not had very many at that price.

Q. Are you charging the five dollars?

A. No, sir; I put it in the agent's hands.

Q. It is the railroad company that charges the five dollars?

A. Yes, sir. I told them when they sent them there that I wouldn't have nothing at all to do with it—that is, in that way.

Q. What time did you say you got to the wreck at Nankin in the morning?

A. Between eight and nine o'clock.

Q. What was the condition of the cars there?

A. The condition of the cars was some of them pretty badly broken up.

Q. How many of them?

A. I won't tell you that. I could not judge.

Q. How many were off the track?

Objected to as not cross-examination.

A. I don't know as I could tell you that. I don't know anything about it.

Q. How many cattle were loose around there?

A. I could not tell you that, for I did not count them.

Q. How many car-loads of cattle were there in the cars?

A. I could not tell you that, for I did not make any count of it in any shape or form, in that way. I went and looked at the cattle just like somebody else would, and went away again.

508 Q. How long did you remain there?

A. The first time I was not there a half an hour. That was

when I went down between eight or nine o'clock. I did not stay there over half an hour, if I stayed that long, and then I came back and went down in the afternoon. I got down there a little after two o'clock, and probably stayed till six, but I did not make any count of anything—count the cars or count the cattle or anything about it.

Q. You say you got there and stayed there till six o'clock that night?

A. That evening, yes—Sunday evening.

Q. Were the cattle reloaded then?

A. No, sir.

Q. Why not?

A. I could not tell you that.

Q. What were they doing all that time, clearing up the wreck?

A. They was cleaning up the wreck when I was there, pulling cars around—that is, broken cars. The track was cleared, I believe, so they could pass down if they wanted to before I got there in the afternoon, and in the morning when I went there there was some cars laying across the track yet.

Q. You do not know how many?

A. No; I don't know.

Q. You say you saw some heifers and cows in the field?

A. Yes, sir.

Q. You are not able to say how many?

A. No, sir.

Q. And the bulls were hitched along the fence?

A. Yes, sir.

Q. You said something about water; was there water there at that time?

A. Yes, sir; there was plenty of it there.

509 Q. Was it in swampy ground?

A. It is there in a kind of swail. It is a wet place, like water will make in ground.

Q. What I mean is, was there water on the surface so that you could get to it?

A. Yes; they could drink it off the top of the ground.

Q. Could you get it with a bucket?

A. No; I don't think they could have got it with a bucket by bucketfuls, but there was places that bucketfuls could be got there. It is just like spring water will make any place where it ain't dug out—little places so that little basins of water would gather in.

Q. Cow tracks and things of that kind?

A. It was bigger than that; little basins, probably, that they could get water out of; and over at the northwest corner, in the woods, there is a regular run; they could have got water there by just going right into it.

Q. Did you notice any dead cattle there?

A. There was four.

Q. You sent one of your cows to be served by that bull of Tobias's, did you?

A. The one that I sent was the railroad heifer.

Q. And she proved to be in season again or in heat again afterwards, did she?

A. Afterwards; yes, sir.

Q. And then she was served by this bull that was crippled?

A. Yes, sir.

Q. Her hoof, you say, was cut?

A. Her right hoof was cut about half ways around upon the inside—her right leg.

Q. Her fore foot or hind one?

A. Hind foot.

Q. Just above the hoof or up by the fetlock joint?

A. It was just right above the hoof.

510 Q. And that half of the foot came off, did it?

A. Just the horn part of the outside, not the whole hoof.

Q. How long was she lame?

A. She was lame about two months that she limped considerably; then she commenced improving and got better, and it still got down less until now you can't notice it on her at all.

Q. How was this Tobias bull? What was the matter with him?

A. I don't know as there is much the matter with him, if anything. I did not examine him. I have not seen him for I can't tell you when.

Q. When you saw him what was the matter with him?

A. When I saw him he was lying on the railroad. I have seen him since, to be sure, but he was crippled up. He was so that he could walk around, but was stiff.

Q. By "on the railroad" do you mean on the track?

A. On the railroad ground is what I mean. He was not on the railroad track.

Q. Was he in condition to get up?

A. He could not get up then.

Q. He was in no condition to ship then, was he?

A. No, sir.

Q. Was the large bull that you have in condition on the morning of the 16th of September, 1883, to put on a train and ship?

A. No; I don't think he would be; that is, the one that I took down. I said he walked down to my place—that was a trifle over a half a mile—but it was very slow travelling.

Q. How long did it take you to get him down there?

A. I did not time it. I don't know. Anything like that

511 I don't like to give.

Q. An hour or so?

A. I could not tell you. He travelled slow. You would have just as much idea about it as I.

Q. Did you have to urge him a good deal to get him along?

A. Well, they urged him along, but slow.

Q. He travelled then, did he not, with a great deal of reluctance? He did not go of his own volition or desire, did he?

A. They drove him along slow. When it seemed like he got tired and puffed a little they would stop and let him rest. I helped to drive him till we got about half ways or a little over and then I let

the boys fetch him the balance of the way. They stopped and let him rest and I went on home.

Q. How long after you got him home did he lie down?

A. I don't know as I could tell you exactly how long.

Q. That night or the next day?

A. Oh, he lay down the same day. I took him down in the morning.

Q. Did he remain down long?

A. Yes; he lay down a great deal of the time then.

Q. Did not get up very often unless you urged him to, did he?

A. No; he would get up sometimes of himself.

Q. I understand you to say that now or for some time afterwards, when he would step on that leg, his hip would rise up when he would bear his weight on it?

A. Yes; inclines to move up like that (indicating) a trifle, but not away up. I mean not extreme.

Q. When the accident occurred how far?

A. Oh, so that your eyes could see it quite plain.

512 Q. And it would continue until he put his weight on the other foot?

A. On the other foot again, and it does that a little bit yet, but not as much as it did when he first came there.

Q. How long after the accident was it that you saw Tobias's bull the first time?

A. After the accident the first time I saw him he was over in his field. He had got up so that they could get him over into his field.

Q. When was that?

A. I don't know as I could give you the exact date of that. I don't know as I would try to.

Q. Did you see him that week?

A. It was the same week. He was hurt on Sunday morning. It was the same week after the Sunday morning that I saw him. They got him over into his field.

Q. How long did he remain there before he was moved?

A. That I don't know anything about. I just saw him there by going along the road.

Q. Do you know how long he remained there in that position in that lot?

A. No, sir; I don't know. I could not tell you that.

Q. What is his condition now?

A. That I won't give, for I don't know.

Q. When did you see him last?

A. I see him about every time I go by the road, but it is at a distance. I do not often go over to see him.

Q. You do not know whether he is well or not?

A. I could not tell you what condition he is in.

Q. He is out in the field with the other cattle?

A. With the other cattle; yes, sir.

Q. You do not know of him having served, excepting the one cow, of your own knowledge?

513 A. I won't give any count, only what he has served for me—that is, two cows.

Q. The Tobias bull?

A. The Tobias bull. The 15th of April and the 6th of May.

Q. Which one of those was it that was served by him that did not prove to be with calf?

A. That was the railroad heifer.

Q. Was that one of those?

A. Yes, sir.

Q. When was she served?

A. I could not tell you the exact date. I had that down at home, but I have forgotten it now.

Q. Did he serve two cows besides the railroad heifer?

A. Yes; that was for me.

Q. Is that bull as large as the other one?

A. No, sir.

Redirect Ex.

Redirect examination:

Q. I want to inquire of you whether, in this field in which the cattle were, south of the track, when you went to the wreck, there was any grass feed at the time.

A. There was not so very much feed in it. It was dry grass; never was pastured down very close, but it was just like any other field. It was in the fall of the year. It was kind of dried up. Where this water was running down there, there was some grass. That was kind of wild grass. The other grass was kind of dead substance, like any grass would be in the field, but never was pastured close like it is this fall.

Q. In the matter of the service of cows by this bull that you have, if I understand you aright, you have known of his serving your neighbor's cow, one cow of your own, one cow on your place that belongs to your aunt, and also this railroad heifer, as you call it?

A. Yes, sir.

514 Q. Making four in all?

A. That makes four cows in all that he has served.

Q. When you took charge of this bull, if I understand you aright, you declined to the railroad agent to have anything to do with the matter of having him put to other cattle for pay?

Plaintiffs' counsel object to any testimony as to any arrangement with the railroad company.

A. Yes, sir; I said whatever was to be done with him was to be done through the agent.

Q. And since you have had him there has been nothing in that way, to your knowledge, done by the agent or through the agent?

A. No, sir; he has never sent a cow there.

Q. State what numbers you found on the hoof of the bull.

A. I found on the bull "106" on the left forward foot and "111" on the heifer.

Q. On the left forward foot?

A. Yes, sir.

Q. Cut or branded into the hoof?

A. It is hard for me to tell how it was done, whether it was cut or burnt. If it was cut or burnt, it was done with something sharp. The figures was so anybody could see them.

Q. Plain, good figures?

A. Yes, sir.

Recross-Ex.

Recross-examination:

Q. What would that calf out of that heifer weigh, in your judgment?

A. I should think seven hundred. It may be less; it may be more; it is just a guess. Maybe it might weigh seven hundred and it may not go that and it may go a little over, but I would not want to put it any higher than that. I could tell better if I
515 & 516 would weigh it. He is short and blocky.

Q. Were not the figures on the hoof of the bull "109" instead of "106"?

A. It depends on which way you stand. If you turn your face to the hoof—come up and look at it in this shape (indicating)—it would be "106," but if you stand up this way it would be "109."

Q. If you stand with your back against the animal and look down it would be "109," but if you stand with your face towards the animal it would be "106"?

A. Yes.

(Signed) J. J. SHOEMAKER.

Affirmed before me by said J. J. Shoemaker and by him subscribed in my presence this 10th day of September, 1884.

SYLVESTER PRICE,

[L. S.] *Notary Public.*

517 In reading the deposition of the last-named witness, Schumaker, and before the question: "Have you preserved any record of the time and occasion of service?"—

Mr. WILLIAMS said: All that testimony is objectionable. These cattle have never been delivered to us.

Mr. WERNER: We claim they were abandoned there by these parties. There is no evidence that we assumed charge of them. The evidence, on the contrary, is they went off and left them there. We don't think because we injured an animal you have the right to go off and abandon it.

The COURT: You are in no condition to show that fact under these pleadings. You have filed a general denial. There is proof of non-delivery here.

Mr. WERNER: You think we ought to have plead specially that point?

The COURT: You would have to plead that specially. *Prima facia* they were in your possession. It was you who left them.

To which ruling of the court the defendant then excepted.

Mr. WERNER: Well, this particular question was not objected to.

The COURT: I say that portion you may read now to show the capacity of this bull after he had received the injury. That is competent. Then you need not read any of that proof on
518 the theory I am going to instruct the jury as I have suggested.

Counsel of defendant then went on with the reading of the deposition.

Counsel for defendant then read the deposition of William F. Tobias.

W. F. Tobias.

Deposition of William F. Tobias, a witness on behalf of the defendant, taken before Sylvester Price, a notary public in and for the county of Crawford, in the State of Ohio, at the office of J. W. Coulter, in the city of Galion, in said county and State, in the presence of Mr. Cosgrove, as counsel for plaintiffs, and L. A. Russell, with J. W. Coulter, as counsel for defendants.

W. F. TOBIAS, of lawful age, being by me first duly sworn, as hereinafter certified, deposes and says as follows:

(By Mr. RUSSELL:)

Q. State your name, age, residence, and occupation.

A. W. F. Tobias; age, thirty-nine; residence, Nankin station, Ashland county; occupation, farmer and saw-mill together.

Q. How far is your farm from the station, where this wreck occurred?

A. It corners right up to the station.

Q. How soon after the wreck occurred did you know of it?

A. Between seven and eight o'clock, I think.

Q. Did you go to the place to see it?

A. Yes, sir.

Q. Where were the cattle at that time?

A. They had them unloaded out of the cars that was broke when I got down there.

Q. Do you know how many cars were broken?

519 A. No; I could not tell the number. There was three or four that was about all broke up. There was a good many that was damaged.

Q. And they were engaged in unloading those cars that were broken?

A. No; they had them unloaded when I got down there.

Q. Where were the cattle that they had unloaded?

A. They were in fields on both sides of the road and tied to the railroad fence.

Q. What kind of cattle were tied to the railroad fence?

A. The largest bulls.

Q. What kind of cattle were in the field on the south side of the railroad?

A. They were heifers.

Q. What kind of cattle were in the field on the north side of the road?

A. I think they were young bulls. I did not pay much attention to them.

Q. In which field were the greater number of cattle—in the south or north side?

A. I don't think there was much difference. I could not tell that.

Q. You judged, from the bunch of cattle, about as many in one as the other?

A. Yes, sir.

Q. Have you any idea how many bulls were hitched to the fence along there?

A. No, sir; I have not.

Q. How were the bulls hitched—by head halters or by ropes?

A. By ropes.

Q. Were the ropes around their heads or around their necks?

A. Hitched to their noses, most of them.

Q. A ring in the nose of the bull?

A. Yes.

Q. What was the condition of this field on the south side as to having water?

A. There was plenty of good water there.

520 Q. Sufficient for the number of cattle that were to drink?

A. Yes, sir.

Q. What was the condition of the field on the north side as to water?

A. The same water was in the other field—the same stream.

Q. Which way does the stream run?

A. It runs west.

Q. Runs from the south field down to the north field?

A. Yes.

Q. How far was it from where these bulls were hitched to the fence to the place where they could most conveniently drink?

A. The first ones next to the water was right at the water, and from there on up the road they were hitched as close as they could be hitched to the fence.

Q. One end of the string of bulls that was hitched to the fence was right at the water?

A. Yes, sir. The water ran to the railroad, about where the engines went together—the engine and back of the train.

Q. Where the engine went into the caboose?

A. Yes.

Q. Is there a place or was there at that time a place alongside the track—along the railroad's right of way—where cattle could conveniently drink—that is, if a bull were led to the water was there a place there where the bull could drink?

A. No; not till they cleared it up. The rubbish was right over the water.

Q. How far from where they were to the nearest place where cattle could drink?

A. The most of them was led across the railroad to this water on the north side of the railroad.

Q. About how far had they to go?

A. Just beside the wreck, in that field.

521 Q. About how many rods would it be from where those bulls were hitched along the fence to where they could have got water to drink?

A. Why, the first ones was right at the water, and across into the other field where they led them would not be more than eight or ten rods.

Q. Did you see any of these bulls being led to water?

A. Yes, sir.

Q. Do you know whether or not they were all led to water?

A. Yes, they were all watered; some went up the railroad towards the station, and they were led down to the water that crosses the main road up there—they were led to water there.

Q. What are you able to say as to whether any of those cattle that were taken out of the cars at that place were without water all that day or not; or did they all have access to water?

A. Them that was led across the field had to cross the water; if they was dry they could have drunk.

Q. As far as you know, did any of that stock that was uncarred there and brought out on the ground suffer for lack of water that day?

A. No, sir; I think not.

Q. Did you observe anything in regard to the feed there? Did you see any feed?

A. There was feed laying there from the cars that was broke—sacks of corn meal.

Q. Did you see any hay?

A. Yes, sir.

Q. What condition were these cattle in, generally, that were in the field and that were hitched to the fence, and that were in the north field?

A. They were in good flesh.

522 Q. Did you see any of them that showed any signs of injury or lameness, aside from these three cripples that were left there?

A. No; I did not.

Q. How many were killed?

A. I think there was five—five heifers.

Q. How soon after this wreck did you get the custody of one of the bulls?

A. Why, it was the 22nd I took mine.

Q. The 22nd of September?

A. Yes.

Q. At whose request or instance did you take charge of him?

A. The agent's.
Q. Mr. Edgar's?
A. Yes, sir.
Q. The agent at Nankin?
A. Yes.
Q. Was this the older or younger of the two bulls that were left there?
A. The youngest.
Q. What was his condition when you got him?
A. He was in pretty good order—good flesh.
Q. How was he as to injury or lameness?
A. He was lame in the back hip—left hip I think it was.
Q. In what condition is he now as to lameness or injury?
A. I think he is all right; he don't limp any.
Q. Does he show any scars or evidences of his injury?
A. No, sir.
Q. Now, won't you tell in your own way, beginning at the beginning, all that you know in regard to his being bred to cows or serving cows?

Objected to as incompetent and irrelevant, the true rule being as to the condition of the animal at the time of the accident.

A. I have two calves from him, is all I can say.
523 Q. Have you ever seen him serve a cow?
A. No, sir.
Q. The two calves that you have from him are calves of your own?
A. Yes, sir.
Q. Have they been to any other bull or had any opportunity to get their calves from any other bull?
A. No, sir; they have been together all the time.
Q. Are the calves living?
A. Yes, sir.
Q. When were they born?
A. In July. I could not just tell the date.
Q. Both of them in July?
A. Yes, sir.
Q. What are they—heifer or bull calves?
A. One heifer and one bull.
Q. How are the calves—in good condition?
A. Yes, sir.
Q. What kind of cows were these that were bred to him?
A. Why, just common stock, you would call it—natives.
Q. American cattle?
A. Yes.
Q. Has he been bred to any other cows, as far as you now, besides those two of yours?
A. Yes; Mr. Edgar had two or three there that I don't know anything about.
Q. Have you any knowledge of any of Mr. Shoemaker's cows being sent there?

A. He had one there one day when I was at home, but I was not out of the house. I was sick then, and I could not say anything about it.

Q. Did you have any knowledge of this railroad heifer that Mr. Shoemaker has being brought down there to be bred to him?

A. Yes, sir.

Q. Do you know whether she was bred to him or not?

A. She was there. I could not say whether she took the bull or not.

524 Q. Do you know when those cattle went away from Nankin?

A. On Monday morning.

Q. Do you know where they were carred?

A. Carred there at the cattle yard.

Q. How far is the cattle yard from this field, where they were unloaded, next to the wreck?

A. Not over a quarter of a mile, I wouldn't think.

Q. The cattle were driven and led from the place where they were next to the wreck to the cattle yard?

A. Yes, sir.

Q. And from the cattle yard loaded into cars?

A. Yes, sir.

Q. Do you know how many cars stood there with cattle in them that were not uncarred at the time of the wreck?

A. No, I could not tell the number.

Q. Did you see any cars standing there with cattle in them that were not unloaded?

A. Yes, sir.

Q. Do you know how many cars of cattle were unloaded?

A. There was eight or nine cars that was unloaded.

Q. Do you know whether those cars that were not unloaded had been in the rear train or in the forward train?

A. In the rear train.

Q. Have you any means of judging about the age of this bull that you have there?

A. Not any more than what the men that was along said—that he was two years old.

Q. When you got him?

A. Yes, sir.

Q. Have you any means of judging what his weight is?

A. No; I have no idea what it is.

525 Q. Have you seen this bull that is in Mr. Shoemaker's place?

A. Not lately.

Q. You did see him at some time or other?

A. Yes, sir.

Q. Is the bull you have as large or larger than he, or smaller?

A. No. Shoemaker's bull is one-third larger.

Cross-Ex.

Cross-examination by Mr. COSGROVE:

Q. The big bull would weigh more than five or six hundred pounds, would he not?

A. Yes; I would think he would. He is a large bull.

Q. When did you say you got possession of that bull?

A. I think it was the 22nd of September.

Q. Where was he between the 16th and 22nd?

A. He was on the railroad grounds; could not get up.

Q. You got him over into your field, did you, then, on the 22nd?

A. Yes, sir.

Q. How long was he confined there in a small circuit?

A. He went along to the barn that evening.

Q. And how long before he got so he could move around?

A. Why, he went out and in with the cattle every day after that.

Q. After the 22nd?

A. Yes, sir. It was not over a quarter of a mile to the field or from the field to the barn.

Q. Was it lame and stiff and sore, apparently?

A. Yes, sir.

Q. On the 16th, the day the accident happened, was that bull in a condition to be put upon the cars with those other cattle and shipped?

A. No; he could not get up.

Q. How about the other bull? Was he in condition to ship?

A. No, sir.

Q. And the heifer?

A. The heifer couldn't hardly walk. Her foot was scratched.

526 Q. What kind of a day was that 16th of September—cold or warm?

A. It was not very cold.

Q. Was it not rather a warm day?

A. Yes, sir.

Q. Now, about that water that is around there. Was it not rather muddy and mixed up and tramped over?

A. No; it was good water.

Q. Were not cattle moving around there a good deal, and men working moving the wreck, etc., making the water so that it was absolutely not fit for cattle to drink? Would they drink it at all?

A. Why, they did not appear to be dry. If they were dry they could have drank it.

Q. As a matter of fact, they would not drink it, would they?

A. I could not say whether they tried to drink it or not, but they were right along where it was all the time.

Q. Have you a pond near by there?

A. No, sir.

Q. Or a stream of water running across your land some place?

A. That spring runs across there.

Q. Is there not a pond by the mill?

A. No, sir; no pond there.
A. What is it?
A. It is a running stream of water.
Q. It just runs through in a creek there?
A. From a spring right above the mill.
Q. Is there any pond anywhere around there?
A. No, sir. In both places the water comes from the spring.
Q. The cattle, you say, left there Monday night?
A. No, sir; Monday morning.
Q. What time?
A. I would think it was between six and seven o'clock—somewhere along there.

527 Q. What time of day or night did the accident happen?
A. We did not hear it. It was some time Sunday morning.

Q. Before you got up, was it not?
A. Yes.
Q. How many of the cars were broken?
A. Well, there was nine cars left there that the stock was taken out of.
Q. They were either broken or so damaged that the railroad company did not move them any further at that time?
A. No, sir.
Q. What became of them?
A. They stood there for several weeks afterwards—a week.
Q. Were any of them burned up there?
A. Yes, sir; there was two or three burned up.
Q. The rest of them remained there some time and were finally taken away?
A. Yes, sir.
Q. You say there were nine cars broken and damaged so that they were not fit for the cattle to go in. They could not transport cattle in them, could they?

Objected to.

A. Well, they were left there. There was something broken about them.
Q. When was it that the other nine cars came to take the cattle that came out of these nine broken cars?
A. Sunday evening, just about dark.
Q. Do you know anything about the character of those nine cars that came to take the place of those that were broken and destroyed?
A. Not any more than they claimed they were bedded.
Q. They were just ordinary stock cars, were they?
A. Yes, sir; they hired me to bed the cars that day.
Q. That is, the nine?
A. Yes, sir.

528 Q. Do you know whether they were disinfected or not?
A. I could not say anything about the cars that came.

Q. Who do you mean hired you?
A. The railroad.

Redirect examination:

Q. Did you put bedding in those nine cars that came?

A. No, sir; they were bedded when they came.

Q. You mean, then, that the railroad agent had engaged you to bed them, but when they came there they were bedded?

A. Yes, sir.

Q. What were those cars that came there, cattle cars?

A. I did not pay any attention to them; could not say what cars.

Q. How many cars in that wreck were totally demolished?

A. I could not just say. There was two or three, I think.

Q. I wanted to find out whether it was two or three.

A. I could not say for sure. They was broke up so you could hardly tell how many cars there were.

Q. Do you recollect seeing in what condition the caboose of the train that was run into by the engine was?

A. No; we could not see much of it.

Q. It was pretty badly demolished?

A. Yes, sir.

Q. Do you know or did you observe whether the car next forward of the caboose was pretty badly demolished?

A. No; I could not tell that.

Q. Do you know whether the first car of the rear train was pretty badly demolished?

A. I could not tell which cars was broke. It appeared to be the front cars next to the engine that was broke up, and they were burned.

Q. The cars both behind and before the engine?

A. Yes, sir.

529 Q. Then, if it was three cars that were totally demolished, would you be able to say that they were the caboose, the car ahead of the caboose, and the car next behind the engine?

A. I could not answer that.

Q. Did these cars that stood there with cattle in them stand there at Nankin until the whole business went forward the next morning?

A. Yes, sir; the rear train.

Q. The cars of the rear train that stood there stood there all the time until they, with the other nine that were loaded, went ahead all together Monday morning?

A. Yes, sir.

Q. Did you see any water taken to the cattle in those cars that stood there?

A. No; I did not.

Q. Was there or was there not a water tank there at Nankin?

A. Yes, sir; there was.

Q. Do you know anything about the water supply in that tank?

A. No; I could not say.

Q. Currently, do you know whether there is a good supply of water in that tank or not?

A. Yes; it comes from the spring there. The engines water there the year round.

Q. What do you know about there being a ring in the nose of the bull that you got when he was first there? Was there any ring in it when you got the bull?

A. Yes, sir.

Q. As far as you observed, did all the bulls have rings in their noses?

A. I could not tell that. I think all I seen had rings.

Q. Did you notice anything about numbers being marked on the hoof of the bull you kept?

A. No; we could not see anything.

530 Q. You looked for a mark?

A. Yes, sir.

Q. Did you ever see marks on the hoofs of either of the cattle that Mr. Shoemaker had—the heifer or the bull?

A. No, sir.

Recross-Ex.

Recross-examination:

Q. Whereabouts is that tank—how far from where this wreck was?

A. Oh, just a short distance down the road.

Q. Back of the wreck?

A. No, sir; west from the wreck.

Q. Where were the cars in which the cattle were—those that were not broken?

A. East of the wreck—east of the tank.

Q. The wreck was in front of them, was it not?

A. Yes, sir.

Q. That is, west of them?

A. Yes, sir.

Q. Did not those cows remain there all the time while they were clearing up that wreck during Sunday on the side track?

A. Yes, sir.

Q. They could not pass up to the water-tank at all, could they?

A. They could pull up to the other end and come down the main track.

Q. I mean they could not go up on the side track unless they went down on the main line and came up, could they?

A. No, sir.

Q. Then, so far as those cattle are concerned, they were not watered at all, were they?

A. The cars were not moved.

By Mr. RUSSELL:

Q. You mean by that they were not moved during the day—Sunday?

A. Yes, sir; I could not tell at night.

Q. You do not know whether they were moved Sunday night or not?

A. No, sir.

531 & 532 (Signed) W. F. TOBIAS.

Sworn to before me and subscribed in my presence by the said W. F. Tobias this 10th day of September, 1884.

SYLVESTER PRICE,

[L. S.] *Notary Public.*

533 At this point the court adjourned until to-morrow morning.

APRIL 28TH, 1888.

Counsel for defendant read in evidence depositions of the following parties:

E. H. Smith, A. J. Cole, Geo. Moon, Geo. Williams, Joseph Childs, Hiram T. Worthy, Melville J. Green, Winfield S. Maker, Abel D. Clark, Alonzo Tower, Alfred W. Hosmer, Charles Harrington, and Elisha F. Thayer (taken by plaintiff-, but read by defendant).

Deposition of E. H. Smith.

Deposition of E. H. Smith, a witness on part and behalf of the defendant, taken before Sylvester Price, a notary public in and for the county of Crawford, in the State of Ohio, at the office of J. W. Coulter, in the city of Galion, in said county and State, in the presence of Mr. Cosgrove, as counsel for plaintiffs, and L. A. Russell, with J. W. Coulter, as counsel for defendant.

E. H. SMITH, being by me first duly sworn, as hereinafter certified, deposes and says as follows:

(By Mr. RUSSELL:)

Q. Where do you live?

A. Nankin Station, Ashland county, Ohio.

534 Q. How old are you?

A. I am twenty.

Q. Were you at Nankin at the time of this wreck in September of last year?

A. Yes, sir.

Q. Won't you state precisely what you did and what you know in regard to those cattle being watered on that Sunday?

A. I went and led three of them to water.

Q. Bulls?

A. Yes, sir; three of the large bulls; led them up to the station and turned off to the left there and watered them at a nice stream of water; took them up and tied them in the yard.

Q. At whose request did you do that?

A. The gentlemen that were attending to the cattle.

Q. What do you know in regard to their being watered in the fields where the uncarred cattle were?

A. There was spring water running down through from the south and down through onto the north side; there was running water there.

Q. What do you say as to there being sufficient water in each of those places for the cattle that were there? Was there enough water for the cattle that were there to drink if they wished?

A. Yes, sir; there was plenty there.

Q. What do you say as to the quality of water—whether it was good, fit water for cattle to drink or not?

A. I think it was—nice, clear water.

Q. What do you know, if anything, in regard to the cattle that stood in the cars that were not unloaded?

A. I know nothing about them; only saw them as I walked past.

535 Q. You did not have anything to do with watering them?

A. Did not have anything to do with watering them.

Q. Don't know whether they were watered or not?

A. No, sir; I don't.

Q. How far was it from where those cattle stood in the cars up to the tank?

A. I suppose probably ten or fifteen rod-; close to the wreck.

Q. Was there any difficulty in carrying water in buckets from the tank to the cars if anybody wanted to do it?

A. Why, I don't know as there was any.

Q. Did you see anybody doing that?

A. No, sir; I did not.

Q. You did not get into any of these cars that were standing there?

A. No, sir.

Q. So that you do not know whether the water was in the barrels all right?

A. I don't know that.

Q. How many cattle were killed there; do you know?

A. I don't know exact. I think there was four.

Q. Do you know whether they were heifers or bulls?

A. Heifers, I think.

Q. How many cattle were left there crippled?

A. There was three.

Q. What were they?

A. There was one heifer and two bulls.

Cross-Ex.

Cross-examination by Mr. COSGROVE:

Q. You led three of the bulls, you say, to water?

A. Yes, sir; I did.

Q. At the suggestion of the gentlemen who had them in charge?

A. Yes, sir.

Q. They appeared to be doing everything they could to make the cattle comfortable?

536 A. Well, I don't know about that. I just helped lead them three. They led all them large bulls up to water.

Q. They were giving attention to the cattle as best they could under the circumstances?

A. Yes.

Q. You do not know anything about whether those in the train were watered or not?

A. I don't know whether they were watered or not?

Q. It would be a pretty big job, would it not, to water a couple of hundred head of cattle, carrying it in pails or buckets?

A. Yes, sir; it would have been.

Q. What is the tank—an ordinary railroad tank?

A. Yes.

Q. The only way to get water out of that is to go to the top, is it not, or to let down the pipe and pull it out and turn it off?

A. Yes, sir.

Q. A man could not very well get at it to get it out with a bucket, could he?

A. Well, he could turn that off.

Q. He would let down the pipe, and then it would come pretty fast, would it not?

A. Well, it would get full quicker then.

Q. Did you see those three that remained there just after the wreck?

A. Well, it was along in the forenoon.

Q. For instance, what was the condition of that large bull? Was he in condition to travel with the other cattle in the cars?

A. No, sir; I don't think he was.

Q. Could you have gotten him on the cars, do you think, at that time?

A. I don't know. I did not see him when they led him away.

537 Q. Was he lying down or standing up when you saw him?

A. I think he was lying down when I seen him.

Q. How about the small bull?

A. He was lying down.

Q. And the heifer?

A. I think she was standing up.

Q. In your judgment, were all or any of them in condition to put on the cars like other cattle were and to be carried off? Were they in such a condition as would have made it safe for them to do that?

A. No, sir; I don't think they were.

Q. Where did you see them lead the bulls to?

A. To the stock yards.

Q. Was that where the water was?

A. Just below that; a little ways down the creek; there was running water there, lots of it.

Q. How far was that from the wreck?

A. I guess it was a little over a quarter of a mile.

Q. There was no water right in that immediate vicinity for the cattle, was there?

A. Well, there was that spring water running through there where the young cattle were turned loose, and they led the others right through.

Q. Do you recollect of crossing a creek or little branch there with water in it?

A. Yes, sir.

Q. Did the cattle drink that?

A. No; we did not give them a chance, or much chance. The young cattle was there tearing around, and we led them right through.

Q. Was it not all muddy?

A. Just where they was standing, but there was water running clear through the whole field below that and above, I suppose.

Q. How is it—muddy, miry, or is it clear bottom? Is it
538 not marshy?

Q. Well, of course the water was spread out, and it was wet where they had trampled around over that.

Q. The grass is this coarse, marshy grass, is it not?

A. Yes.

Q. Cattle will not eat that ordinarily, will they?

A. Depending on how hungry they were. Some would and some would not.

(Signed) E. H. SMITH.

Sworn to before me and subscribed in my presence by said E. H. Smith this 10th day of September, 1884.

SYLVESTER PRICE,
[L. S.] *Notary Public.*

A. G. Cole.

Deposition of A. G. Cole, a witness on the part and behalf of defendant, taken before Sylvester Price, a notary public in and for the county of Crawford, State of Ohio, at the office of J. W. Coulter, in the city of Galion, in said county and State, in the presence of Mr. Cosgrove, as counsel for plaintiffs, and L. A. Russell, with J. W. Coulter, as counsel for defendant.

A. G. COLE, of lawful age, being by me first duly sworn, as hereinafter certified, deposes and says as follows:

(By Mr. RUSSELL:)

Q. State your name, age, residence, and occupation.

A. A. G. Cole; age, thirty-six last July; residence, Kent; occupation, car-builder.

Q. Were you engaged in that business in Kent in September or last year?

A. Yes, sir.

539 Q. On the occasion of the wreck of some stock cars at Nankin, Ohio, did you come up with Mr. Smith to the wreck?

A. Yes, sir.

Q. What time in the morning did you get to the wreck?
A. About eight o'clock, as near as I can remember.
Q. You came to that wreck from the east?
A. Yes, sir.
Q. Do you remember what was standing on the side track when you got up next to the wreck and stopped?
A. There was a stock train standing there.
Q. Do you remember what was done with that stock train while you were there?
A. I think it was pulled up on the side track.
Q. Pulled back?
A. Pulled back a few car-lengths from the wreck—those that were not directly in the wreck.
Q. How many of those cars, if you remember, were pulled back from the wreck on the side track?
A. I could not tell how many. I do not know how many cars were in the train and I could not tell how many were pulled back.
Q. Can you remember whether or not all of the train up to the engine was pulled backward, or were there any cars next to the engine that were not pulled backward?
A. I think there were. I think there was one or two that was next to the engine. I would not be sure but there was three. I think there was two that was next to the engine that was not pulled back.
Q. They were too badly broken up?
A. Why, they were loaded with cattle when we got there. They did not pull them up when they pulled the rest of the cars back, because they pulled them back to enable us to get a chance to unload those two cars.
540 Q. What I want to get at is whether those two cars that you unloaded had stood behind the wrecked engine or whether they had been ahead of it.
A. They were behind it, I think, when we unloaded there.
Q. To the eastward of it?
A. Yes, sir.
Q. Had been a part of her train?
A. Yes, sir.
Q. That is your recollection?
A. That is my recollection of it.
Q. And that whatever portion of the train was pulled backward on the side track to get it away from the wreck, two of the cars of that train were left there behind the engine?
A. Yes, sir.
Q. And you went to work at those two cars to unload them—get their cattle out of them?
A. Yes, sir.
Q. Do you remember anything about the condition of those two cars, as to whether or not there was water in them?
A. Yes, sir; there was water in a hogshead in the car.
Q. How much?
A. I could not say.
Q. How deep in the hogshead?

A. I should judge the hogshead was one-third full.

A. How was it as to the next car, as to water?

A. I don't remember of helping unload the second car. I helped take the stock out of the first car, but I don't remember as to the second car, whether I helped to unload that or not. I would not say positively that we unloaded two cars, but I am positive as to one because I helped unload that; helped build a platform from
541 the bank over to the car. I had some plank and helped unload it. That one I know had a hogshead with some water in it *in.*

Q. In what condition were the cattle that you unloaded from that car?

A. Why, they were in good condition, as far as I could see.

Q. Did you unload any there that were injured or crippled?

A. Not out of that car.

Q. Did you out of any car?

A. No, sir; not out of any cars that I helped unload. I did not see any that was crippled or injured.

Q. Did you see any dead cattle about there?

A. Yes, sir.

Q. How many?

A. Four, if I remember right.

Q. How many crippled cattle did you see that were down or in bad shape?

A. I only seen one that was down; two others that were standing on their feet were injured.

Q. Can you remember whether those were bulls or heifers, and which was which?

A. Two were bulls and one was a heifer.

Q. Which was the one that was down?

A. One of the bulls.

Q. Did you see any other injured or crippled cattle about there?

A. No, sir.

Q. Did you stay there all day?

A. Yes, sir.

Q. When did the other cars into which the cattle that were taken out of the wreck were carred arrive there?

A. That I could not tell exactly; I had no watch.

Q. About what time?

A. It was after dinner.

Q. Were they stock cars or box cars?

A. Seven of them were what we call common stock cars and two were what is called palace horse cars.

Q. Special?

A. Special stock cars; yes, sir.

542 Q. Seven of them were ordinary rack cars?

A. Ordinary stock cars; yes, sir.

Q. They had when they came there no water facilities or feeding facilities in them?

A. No, sir.

Q. These two palace cars that came there had water-troughs?

A. They had troughs—feed-troughs; yes, sir; and water-troughs.

Q. What was done with those seven racks that came there, in regard to preparing to take stock?

A. Why, we made feed-troughs similar to what were in the other cars and put them into the cars.

Q. Were feed-troughs made for all those seven cars?

A. Yes, sir.

Q. And put into them?

A. We did not put them all in, to my knowledge, I think, in all the cars, because they did not need them all, I don't think; I think there was one or two that we did not put the boxes that we made in.

Q. What I want to get at is, were all the seven rack cars supplied with feed-troughs?

A. Yes, sir; I ain't positive that there were seven, but all the cars that was required were provided with troughs similar to those that were in the cars that were not unloaded. We used part of the old troughs and others we got lumber for and made new ones.

Q. And provided all the cars that were to take these cattle with troughs?

A. With those troughs; yes, sir.

Q. What was done about supplying all the cars, except the palace cars, with water facilities for the stock?

543 A. Why, we put the hogsheads, what there was of them, into those cars.

Q. Were there enough hogsheads to go around in those cars?

A. I could not be positive on that point, for there might have been some hogsheads destroyed and there might not. That I would not be positive in regard to.

Q. Do you know how many of the cars that were to receive these cattle that had been uncarred were provided with water facilities before they went away from there?

A. That I could not tell.

Q. Do you remember of any cars going away from there unprovided with water facilities?

A. I could not answer that question. I ain't positive whether we had hogsheads enough for all of the cars or not, but I am of the opinion that we did.

Q. How long did you stay there?

A. I stayed all day on Sunday and all night Sunday night till about five o'clock the next morning.

Q. When you left at five o'clock Monday morning had these cattle that had been uncarred there been reloaded?

A. Yes, sir.

Q. All of them?

A. Yes, sir.

Q. Do you know when that train went away from there? Had it gone when you left?

A. No, sir.

Q. But was ready to go away?

A. All ready to go, as far as I knew.

Q. So far as the cars being prepared and stock being loaded?

A. Yes, sir; they were all loaded ready to go.

544 Q. What do you know, so far as those cars into which cattle had been transferred were concerned, about whether there was water put in the casks that were in them or not?

A. I don't know whether there was any more put in than was in or not.

Q. I speak now not of the cars that were not unloaded of their cattle, but I speak of these nine cars into which the cattle were put on Sunday night as to whether there was any water put into the casks that were in those cars or not.

A. We did not put any in.

Q. Did you see anybody else put any in?

A. No, sir; I did not, to the best of my knowledge.

Q. Then as far as you know when you went away from there, there has not been any water put into the receptacles in those cars?

A. No, sir; nothing more than what was in.

Q. Do you mean to say that any of the casks that were taken from the wrecked cars were moved into these nine cars that came there with water in the casks?

A. Yes, sir; some of them had water in.

Q. When they were moved?

A. Yes, sir.

Q. And the water was left in them?

A. Yes, sir.

Q. Do you remember of moving or seeing moved any empty casks?

A. I don't know about the empty ones. I know we spilt some of the water out of one when we were moving it.

Q. What do you know, in regard to the cattle that were uncarred and on the ground in the fields and in the railroad right of way, about there having a chance to get water during Sunday?

545 A. All that were brought up from those that were out down in the lots and brought up from the field had a chance to get a drink, were driven over to a little brook there was there by a saw-mill and had a drink. There was water there and they drank of it.

Q. What do you say as to there being enough water there for all the cattle that were there?

A. Why there was enough water there for all the cattle that there was in the train.

Q. How soon after you got there was the main track so cleared that trains could go by?

A. I could not tell, positive.

Q. Before noon or after noon?

A. I think along about noon; probably a little before 12 o'clock.

Q. Did trains go by there on the main track going west?

A. No, sir.

Q. Did trains go by there on the main track going east?

A. I think that train 12, a passenger train, went by.

Q. Which way bound?

A. East bound.

Q. About what time is train 12 due to pass there?

A. About five or half past five in the morning, I should judge.

Q. She did not get by then?

A. No, sir.

Q. She was delayed till some time later in the forenoon, you think?

A. Yes, sir; or about noon.

Q. Do you remember anything about this train of stock cars that was pulled back—the train that you passed by when you went down to the wreck—the portion of the train that was yet fit to roll? Do you know anything about that being hauled up on the main track and then shoved down by the wreck to the tank to get water in it?

A. No, sir; I do not remember of seeing it; it might have been done.

546 Q. And you do not remember how many cars there were in that train that were pulled back from the wreck?

A. No, sir; I do not.

Q. What time Sunday night or Monday morning did the last of these cattle get loaded?

A. That I don't remember.

Q. You helped about the loading till it was all done?

A. Yes, sir.

Q. Did you see this gentleman sitting over there, Mr. William R. Estill, there upon that occasion?

A. Yes, sir.

Q. About what time in the day did Mr. Smith leave you?

A. About 10 o'clock Sunday morning.

Q. He stayed down there with you two or three hours?

A. Yes; about that time. He sent us to make the troughs. I don't know what time he left there to go home exactly.

Q. When he was away whose orders or directions were you under about your work there?

A. Colonel Holmes's.

Q. Did you yourself do anything about getting any of these cattle to water?

A. No, sir.

Q. Did you see any cattle feed about there?

A. Yes, sir. There was bags containing corn-meal in some of the cars, and baled hay. One box car had quite a load of bags of feed in.

Q. As far as you know, did any cattle that were there during that Sunday suffer for lack of food or water?

A. Why, no, sir; I should not think they did. There was food and water in the cars. Those that were out of the cars was browsing around in the lots. I don't know how much

547 they got to eat.

Q. But they had access to water?

A. They had access to water—yes, sir—when they were brought up to the stock yards.

Cross-Ex.

Cross-examination by Mr. COSGROVE:

Q. How many of those cars that were not unloaded did you look into?

A. I did not look particularly into any of them, only as I passed up and down the train.

Q. Then how do you know there was water in them?

A. I judge from the fact that those we unloaded all had water in.

Q. Then you don't know anything about it?

A. I was not in the cars.

Q. You don't know anything about whether there was water in those cars or not, do you, of your own knowledge?

A. No, sir; not of my own knowledge I don't—any of those that we did not unload or transfer.

Q. Do you say there were water casks put in all the nine cars that were to replace those that were broken and damaged?

A. No, sir; I did not say they were put in all of those. I said that I thought they were put in all of those, but I was not positive.

Q. How many of those water casks did you help transfer from the injured cars into the cars that replaced them?

A. That I could not say, but pretty much all of them. There was quite a gang of us there to work.

548 Q. Where did these cars that were injured, from which you took the water casks, stand when you loaded them into the other cars?

A. They stood on one side track, and the empty cars stood on another.

Q. How did you run them across?

A. Ran them across on planks.

Q. How many of them do you testify now had water in them?

A. I did not say how many had water in.

Q. Well, say it. That is what I want you to say.

A. I could not say.

Q. Was there more than one that had water in it when you put it into the other car?

A. Yes, sir.

Q. Were there more than two?

A. Yes, sir.

Q. More than three?

A. I could not say whether there was more than three or not or how many, but I know there was more than two.

Q. You reached there with Mr. Smith, did you, in the morning?

A. Yes, sir.

Q. About seven o'clock?

A. About eight o'clock, I should judge.

Q. Remained there until Monday morning about five o'clock?

A. Yes, sir.

Q. What were you engaged in during the day?

A. Making troughs principally for to put in those cars.

Q. Who directed you to make those?

A. Colonel Holmes and that gentleman there (Estill).

Q. Did you make troughs that would hold water?

A. I did not try any of them; I don't know whether they would hold water or not.

Q. You are a mechanic, are you not?

A. Yes, sir.

Q. They were put in for that purpose, were they not?

549 A. They were put in for to replace those that were broken up, and made just like the others. I don't know whether the others was put in to hold water or not.

Q. How many of the old ones did you get out of the broken or injured cars?

A. I could not say.

Q. After the casks were removed into the cars that came there to replace the broken and injured ones, were the cars run alongside of the water-tank and water put into them, or was there any water put into any of these tanks during that day?

A. I did not help put any in.

Q. Was there any, to your knowledge?

A. No, sir; not to my knowledge.

Q. You were there all day?

A. Yes, sir.

Q. And all night until the next morning at five o'clock?

A. Yes, sir.

Q. Busy in helping to repair the wreck?

A. Yes, sir.

Q. Where did the nine cars, if there were nine, out of which the cattle were not moved, stand during the day and the night?

A. They stood on the side track, I suppose. They might have been moved on that side track a half a dozen times and I not have seen them.

Q. Whereabouts on the side track were you working?

A. I was working to the right of the side track.

Q. Were you working east or west of those cars?

A. At the east end of them—above them.

Q. The water-tank was east of you, was it not?

A. No, sir; it was west.

Q. And the stock yards were east of you?

A. We were east of the stock yards.

550 Q. The wreck was between you and the water-tank, was it?

A. Yes, sir.

Q. The cars in which the cattle were kept all day were east of the wreck, were they not?

A. Yes.

Q. The wreck was between them and the water-tank?

A. Yes, sir.

Q. Were they moved off of that side track until about the time the train was formed and they started west?

A. That I could not say. There was a blockade in the freight, and trains were constantly moving one way and another and from

one track to another, and I could not tell whether they were moved or not.

Q. Were those cattle moved from the side track on which they were when you first went there until you left that next morning?

A. That I could not say.

Q. What time did you get through loading cattle?

A. That I could not tell.

Q. How long before the track was cleared?

A. That I could not tell. It was some time before dinner, but just what hour I could not say.

Q. I understood you to say that the train left there about five o'clock in the morning?

A. The train that I went home on left about five o'clock in the morning.

Q. Had this cattle train left there before you left?

A. I don't think it had; still I am not positive. I was very busily engaged about that time in thinking about getting home and thinking about getting something to eat.

Q. Then, you were not paying much attention to what was going on there?

551 A. I was done my work at that time.

Q. What time was it?

A. At five o'clock in the morning, I was down there then. I left there on the first train bound east.

Q. And you are not able to state whether the train that was to take the cattle away had left then or not?

A. No, sir; I am not.

Q. Do you know what time they got through loading the cattle?

A. I could not say.

Q. Did they get through about 12 o'clock at night?

A. They got through some time about that time or after. I could not say positively.

Q. Did you help reload the cattle?

A. Yes, sir.

Q. Did you help reload all those nine new cars?

A. Why, all that were transferred, yes.

Q. About how long did you remain there after you got through loading?

A. I could not tell you exactly, because I don't know exactly what time it was when we got through.

Q. Exercise your judgment and say whether it was an hour or two hours or three hours, or more or less?

A. Well, it would puzzle me to tell how long.

Q. What did you go to doing after you got through loading the cattle?

A. Did not go to doing anything.

Q. Did you do anything there then?

A. Did not have anything to do; no, sir. We gathered up the lamps and torches we had and took them over to the station and waited for the first chance for a train home.

Q. About how long did you wait?

A. That I could not remember.

Q. Have you any idea?

A. No, sir; I have not.

552 Q. Did you wait 10 minutes?

A. Oh, yes; it was probably longer than 10 minutes.

Q. You are not able to state whether it was one hour or three?

A. No, sir; I would not swear whether it was one hour or three.

Q. What is your best impression?

A. I have not any impression on the subject that I know of, for I did not pay any very particular amount of attention to it in regard to time.

Q. You are not able to state whether you remained there 10 minutes or three hours after you got through gathering up the lamps, &c.?

A. That is a pretty hard question to answer. I did not pay very much attention to the time of night or to the time we got through or to the time we left.

Q. Is that your only answer to that question?

A. Yes. I would not give any stated time because I don't remember.

Q. I do not ask you to state the exact time; I ask you to give your impression, if you have any—what your judgment would be.

A. We got through loading the cattle some time after midnight. I think it was after midnight, but at what hour I could not state, and we left there about five o'clock in the morning. It might have been two or three hours after we got through loading the cattle, but I could not specify any given hour or hours.

Q. Is it not your judgment that you got through loading the cattle about midnight on Sunday night—say 12 or one o'clock?

A. Why, along about that hour some time, I should judge—

553 from midnight to two o'clock.

(Signed) A. G. COLE.

Sworn to before me and subscribed in my presence by said A. G. Cole this 10th day of September, 1884.

[L. S.] SYLVESTER PRICE.

Deposition of Geo. Moon.

Deposition of Geo. Moon, a witness on the part and behalf of the defendant, taken before Sylvester Price, a notary public in and for the county of Crawford, State of Ohio, at the office of J. W. Coulter, in the city of Galion, in said county and State, in the presence of Mr. Cosgrove, as counsel for plaintiffs, and L. A. Russell, with J. W. Coulter, as counsel for defendant.

GEORGE MOON, of lawful age, being by me first duly sworn, as hereinafter certified, deposes and says as follows:

(By Mr. RUSSELL:)

Q. State your name, age, residence, and business.

A. George Moon; I will be forty-three years old the 17th day of

next October if I live that long; I live in Kent; I am a car-builder by occupation now.

Q. Was that your residence and business in September of last year?

A. Yes, sir.

Q. Did you go with Mr. Smith, under his orders, from Kent up to this wreck at Nankin?

A. I did.

Q. Do you remember what time in the morning you got to work?

A. It was not far from eight o'clock.

Q. And how long did you stay there?

A. I stayed till Monday morning about five o'clock.

Q. During all that time what work were you engaged in?

A. The first work we done was to clear the track—that is, to get the rubbish out of the way; then we got the cars out of the way, so as they could get the trains through; that was the first we
554 done. They had the stock out of two of the cars when we got there.

Q. Can you tell how many cars of the rear train and how many cars of the forward train had stock taken out of them?

A. No; I could not.

Q. You came up from the rear way?

A. Yes, sir.

Q. Can you tell how many cars of that rear train were so broken up that the cattle had to be taken out of them before you reached the engine?

A. I don't think there was any cars of the rear train.

Q. What was done with the cars of the rear train?

A. They was pulled back out of the way when we first got there—that is, they was pulled back as soon as we could get to them and pull them back so as to get to the other cars.

Q. You think all the cars of that train were so that they would roll on the track?

A. I think so.

Q. Clear down to the engine?

A. Yes, sir.

Q. Beyond the engine, do you remember how many cars were so broken up that they had to be unloaded?

A. There was three cars that I am positive of.

Q. You mean three cattle cars?

A. Yes, sir.

Q. They were beyond the caboose?

A. Yes, sir.

Q. The caboose was the first thing that the wrecked engine had struck?

A. Yes, sir.

Q. How many cars were unloaded—that is, how many cars besides these three that were so badly broken up, had draw-heads broken or anything broken about them so that they had to be unloaded and left there—transferred into other cars?

A. There were nine cars in all, I believe, transferred.

555 Q. That is, six besides these three that were so badly broken up?

A. Yes, sir; the six was transferred to the stock yard.

Q. The six cars were pulled back of this rear train and unloaded at the stock yard?

A. Yes; in the stock yard.

Q. Then the cattle that were loose on the ground were the cattle that came out of these three badly demolished cars?

A. Yes, sir.

Q. What time in the day did those nine cars come there that these cattle were reloaded into?

A. I could not say that, for I was not where the cars was brought. I was down to the wreck working there till they got troughs ready to put into the cars; then we was sent there to help put them in and help load the cattle.

Q. Were you engaged in that work of helping to put the troughs into those cars that came there?

A. Yes; I helped put in some of them.

Q. These cars that came there came from the west, did they?

A. I don't mind which way the cars did come.

Q. Do you remember how many of them were palace stock cars?

A. Two of them.

Q. The other seven cars had to be provided with feed-troughs and with water-tanks?

A. Yes, sir.

Q. Did you do anything about helping to get the water-tanks into those seven cars?

A. I did. I helped put them in. There was two of them that we took out of the other cars; took the cars alongside of them, laid planks down, and shoved them in at the doors.

556 Q. That is to say, you took these cars that were in bad condition on the side track, and you set these new cars on the main track opposite them——

A. I think there was two side tracks.

Q. Or on the spur track opposite them, and you laid planks across from one door to the other and shoved these water-tanks across into the cars that newly came there?

Objected to as leading.

A. Yes, sir.

Q. How was it in regard to those tanks that you helped shove across from damaged cars into the newly arrived cars, as to having water in them?

A. Those two that I helped move over had water in them.

Q. What do you know as to the other five of the seven cars, as to whether tanks were put in them or not?

A. They was put in, I am pretty certain, all but one car, and that I could not say, for I helped put those in myself; took them out of the stock yard and rolled them up into the cars.

Q. All except one of those cars, and as to that one you do not know whether there was any tanks got into it or not?

A. I could not say, but the rest of them I know.
Q. You know that of the seven cars tanks were put in six?
A. Yes, sir.
Q. And that two of those tanks had water in them when they was put in?

Objected to as leading.

A. Yes.
Q. Can you give us any idea as to the amount of water that was in those hogsheads?
A. No, sir; I could not. I should judge by the heft of them—that is, by pushing on them—that there was half or two-thirds
557 of a barrel, maybe more, in each one.
Q. Can you give us any information as to the extent to which these six cars that were hauled up to the stock yard and there unloaded were damaged—that is, what part of them was injured or how extensively they were injured?
A. Nothing to amount to anything, only the draw-heads broken.
Q. The three stock cars that were forward of the caboose, on the forward train, were pretty badly demolished, were they?
A. Yes.
Q. Do you know whether they were repaired or whether the wrecks of them were burned or what was done with them?
A. There was one of them repaired, for I bossed the job of it myself.
Q. Do you know of what road that was a car?
A. The Pittsburgh.
Q. That was repaired at the Kent shops?
A. Yes, sir.
Q. Do you know what was done with the wreck of the other two stock cars?
A. They was burned, I believe, there.
Q. Did you assist about repairing those six?
A. I think I did, some of them. I am not positive, but I know I repaired that one. I know there was a good deal of work on it.
Q. Did you assist in reloading those nine cars with cattle up at the stock yard?
A. I did; yes, sir.
Q. Did you assist about getting the cattle that were about the wreck there up to the stock yard?
A. No, sir; I did not.
Q. Did you observe anything there in regard to feed for the cattle?
A. Yes; there was several bags of corn meal and some
558 hay in bales in the car. I know after we got the cattle loaded they wanted the feed straightened around, and we got into the coal car and straightened it up for them and moved it up to one end of the car and their bedding into the other one.
Q. Do you know what car their bedding had come out of?
A. I think it came out of the box car.
Q. Do you remember how badly that box car was injured?

A. Not very bad. I think all that was injured about that was one corner post knocked out and the end carling and maybe a couple of braces and some sheeting.

Q. Where had that box car stood in the forward train?

A. When I saw it it stood west of the stock.

Q. That is, beyond these three badly broken stock cars?

A. Yes, sir.

Q. Was it itself injured, except as you have told?

A. No; the trucks might have been injured some, but the body of the car was not very much.

Q. Where was this coal car gotten from that the bedding was taken to?

A. That I don't know, where they did get that.

Q. The bedding was transferred from the box car into the coal car?

A. Yes, sir.

Q. And some feed was put into this coal car?

A. Yes, sir.

Q. During Sunday did you see anybody taking feed up to these cattle that were in the train that was moved up to the stock yard?

A. They had feed right in there, for I helped carry it out of the cars myself—sacks of meal.

Q. You helped carry it out of the six cars that had been unloaded up there?

559 A. I won't say that I did out of the whole six, but I did out of part of them. I helped carry out feed and hay.

Q. Did you observe at that time as to whether there was any water in them?

A. Yes, sir; there was, for I know we rolled out two of the casks and poured the water out on the ground.

Q. Rolled them out on the ground, and afterwards rolled them into these other cars?

A. Yes, sir.

Q. In regard to the balance of the train of which those six cars unloaded at the stock yard were a part, did you go into any of those other cars?

A. No; I did not.

Q. You do not know in what condition the feed or water was in those cars?

A. No; I could not say to that.

Q. Did you state at what time you got them all loaded?

A. No; I have not yet, but I should judge it was not far from four o'clock Monday morning; got them all loaded and ready to go home.

Q. When you say "all loaded" you mean the nine cars?

A. The nine cars, and the feed fixed.

Q. And the troughs all prepared?

A. Yes, sir.

Q. When you got done with that work, what do you say as to whether the nine cars were in complete shape as far as feed and feed facilities were concerned?

A. As far as I know, they was. The feed was there, and it could have been very easy put into the troughs.

Q. How many cattlemen were there with you that day?

A. That I could not say. I think there was four. I know that gentleman right there (Wm. R. Estill) was there.

Q. And how many men besides of his employees?

560 A. I think there was three others.

Q. What were these men—what nationality?

A. Some of them were Scotch.

Q. Had those three men been helping about there during the day?

A. They did not help very much, I don't think; not that I seen. I know they did not help very much about the stock, only to get them into the cars.

Q. They did help, did they, about the loading matter?

A. Oh, they went out and picked out certain ones and put them in different cars; told us what ones to lead in. We done so.

Q. In the loading were bulls put in separate cars from cows?

A. I think they was. I am not positive.

Q. About how many head did you put into each of those cars?

A. Those large cars—those palace cars, they call them—I think there was thirteen head in each one, and the others from nine to eleven, according to the size of the cattle. I think that is the way it was. I am not positive.

Q. How many cattle in all do you think you loaded into those nine cars?

A. I could not say; not far from ninety, I should judge.

Q. If the seven took an average of ten, that would be seventy, and twenty-six would be ninety-six; and if the average was not quite ten, it would be in the neighborhood of ninety, you think?

A. Yes, sir; somewheres along there.

Q. About what number of those cattle that you loaded in were bulls?

A. I could not say to that. I know that quite a number of them was bulls.

561 Q. Do you think there were as many as two car-loads of bulls?

A. Yes, I should think there was; there was several large ones, and then there was some small ones.

Q. Did you notice where the bulls were kept during the day?

A. The bulls, I believe, was tied up to the fence, some of them. I know some of them was.

Q. Do you know whether during the day any of those bulls were led to water? Did you see any such thing as that?

A. No; I did not.

Q. Do you know anything about the condition of the fields; whether there was water in them or not, where the cattle could get to it?

A. Yes, sir; there was water in them.

Q. Enough for the cattle to drink?

A. Yes, sir.

Q. During Sunday did any of these stockmen that were there carry any feed and distribute it to these cattle in the fields that you saw?

A. I don't remember now, but it seems to me they did; but I would not be positive.

Q. Do you remember anything about any of those cattle having tin tabs in their ears?

A. No, sir; I do not.

Q. How many cattle did you see there that were killed?

A. Four.

Q. What were they?

A. Heifers.

Q. How many cattle were left there in a crippled condition?

A. Three—two bulls and one heifer.

Q. How did the bulls compare in size?

A. One was considerably larger than the other.

Q. What was the matter with that big bull?

A. He appeared to be hurt about the fore shoulder, or somewheres.

Q. Stiffened up, jammed?

A. Jammed some.

562 Q. Do you remember anything about his hip being broken?

A. No; it was not broke, because if it was he could not stand on it.

Q. And you saw him stand?

A. I saw him stand by the stock yard.

Q. How was the little bull?

A. The little bull was lying down when we first went there, and we had to roll him over; rolled him probably twenty feet to get him out of the way, and he made no move to get up until along the latter part of the day, and then he got up and walked around.

Q. How was he as to his condition when he got up and walked around?

A. He was pretty stiff; he naturally would be.

Q. Cut in any way?

A. I saw little marks on the back of his fore shoulders where the hair was rubbed off some, where he had had a bruise.

Q. Did he act as though his spine were injured?

A. Well, you could not tell so soon how he was injured.

Q. When he got up he was stiff?

A. He was stiff.

Q. Difficult for him to move?

A. Yes, sir.

Q. Did he get up himself or was he got up?

A. He got up himself, I believe. The first I saw of him he was up. I could not say that anybody helped him up.

Q. How about the heifer?

A. The heifer was hurt considerably.

Q. How was she hurt?

A. Why, she was lame.

Q. Did you see her when she was taken out from being fast?

A. No; I did not.
Q. Which leg was she lame on?
A. That I could not say now. It has been so long I could not remember.
563 Q. She was up, was she?
A. Yes, sir.
Q. How were those cattle unloaded at the wreck? What kind of a construction was made to unload them?
A. The first cars that was unloaded I could not tell you anything about, because they was out before I got there—that is, the two where the dead ones was; and the other one—it seems to me they got some plank and made a runway out from the car door onto the bank and led them out on that.
Q. Now, in regard to all these cattle that you helped to load into nine cars, barring out the dead ones and these three crippled ones that were left there, describe their condition and their action.
A. They looked very well. I know they were full of besom—that is, they liked to get out and play.
Q. It was the bulls that had the besom in?
A. All of them; yes; the bulls, because there was several of them, small ones, was a-bunting each other and tearing around considerable. Mr. Estill knows that himself. The big ones was tied up to the stock yard, and there was two or three heifers that went out of the stock cars down into the stock yards a-climbing. I know I had hold of one, and it was all I could do to hold her, and when I took her up again she went as fast as she did when she came down.
Q. Now, in regard to all those cattle that were loaded into the nine cars, was there any among them upon which you observed any bruise, or injury, or jamb, or lameness, or anything of that sort?
A. No, sir; there was not any one at all.
564 Q. Are you able to say in regard to all those cattle that, as far as you observed, they were in good condition—uninjured?

Objected to as leading.

A. Yes; they was, as far as I could tell in the night, when we loaded them. In the daytime I saw them walking around there and did not notice anything wrong with them at all. They was feeding and laying down, some of them.
Q. If there were any injured cattle among those, you did not see them?

Objected to as leading.

A. No, sir; I did not.
Q. Had the bulls rings in their noses?
A. I think they did—the large ones. I am not positive now, but I think they did.
Q. Those of them that were tied, how were they tied—by the rings in their noses, or around the neck, or around the head?
A. Tied by the ring in the nose, I believe. I know that is the way we led them up into the cars.

Q. Was that train all in readiness to go forward when you left there?

A. Yes, sir.

Q. Do you know at what time it did leave Nankin?

A. No; I do not.

Q. Do you know how many cars of cattle there were besides these nine cars that had been reloaded?

A. No, sir.

Q. Can you give any approximate idea as to the number?

A. No.

Q. Were they all coupled together into one train—the nine new cars and the old ones that had been standing there?

A. I believe they was. I know everything was ready.

Q. Your work was all complete?

565 A. All complete. They said they were going to Mansfield, I believe, or Ashland; somewhere along there.

Cross-Ex.

Cross-examination by Mr. COSGROVE:

Q. How many cars did you say you helped put casks into?

A. I think there was six of them altogether.

Q. What kind of cars were they—palace cars?

A. No, sir; they were not. They were common stock cars.

Q. There were how many of the common stock cars that you did not put casks into?

A. I think there was one that I did not help.

Q. Then were there seven common cars?

A. I think there was.

Q. Are you as positive about that as you are about helping to put casks in?

A. I am pretty positive that there was seven of the cars.

Q. And only two palace cars?

A. Yes.

Q. Were there not three palace cars?

A. No; I don't believe there was.

Q. But you are sure that you helped put casks in six?

A. I am pretty sure of it; yes.

Q. Were there any casks broken in the collision?

A. I did not see any that was broke at all.

Q. You do not know, then, whether there were any broken or not?

A. No; I don't, for I did not see any that was broke at all. If I should have seen any staves lying around there I should have known where they came from, but I did not see any.

Q. There was water in how many of those, did you say, when you put them in?

A. There was two that I helped put in that had water in, and the rest of them—I don't remember whether there was two or three of

them. I know there was two, but whether there was three
566 or not that we poured the water out I could not say.

Q. The others you do not recollect whether there was water in or not?

A. No; I don't.

Q. If there was would you not be as apt to recollect them as those two?

A. I might have not helped roll them out.

Q. Did you help put them all in?

A. Yes; I helped put them all in.

Q. Would you not know whether there was water in them just as well?

A. I know there was not, only in those two, because we put them in in the stock yard.

Q. Then there were four.

A. There was four that had water in that I know of, and the others I could not say.

Q. How much water did they have in them—half full or quarter full?

A. They was not half full. There might have been probably six or eight or ten inches in the bottom of them. They was pretty good-sized hogsheads. I should judge they would hold three or four common barrels; maybe more.

Q. Why did you pour water out of two of them and not out of the others?

A. We could not get them to the cars with the water in them; that was the reason.

Q. Do you mean you could not get them out of the door?

A. We could have got them out of the door, but then we could not get them onto the other side of the cars; the cars was not where we could reach them.

Q. Were the cars so far apart that you could not lay plank and run them across?

567 A. The cars was not in the right shape; they was down below.

Q. They were not parallel with each other?

A. No.

Q. The two that you got water into were parallel?

A. Yes, sir.

Q. How long have you been a car-builder?

A. I have worked at it going on sixteen years.

Q. Prior to that time what were you doing?

A. My trade is wagon-making.

Q. Have you ever been engaged in handling stock?

A. Well, I was raised on a farm; yes, sir; about around stock a good deal.

Q. When did you quit the farm?

A. I quit farming just before the war; when the war broke out, 1861.

Q. You have not been engaged in the stock business since to any extent?

A. No, sir; I have not.
Q. What are you doing now?
A. I am car-building.
Q. Are you working for a railroad company?
A. Yes.
Q. What company?
A. The New York, Pennsylvania & Ohio.
Q. That is the road upon which the accident occurred?
A. Yes, sir.
Q. Working at Kent?
A. Yes, sir.
Q. The N. Y., P. & O. is a part of the system known as the New York, Lake Erie & Western?
A. Yes, sir.
Q. In what condition were those three cattle that were left there that day? Were they in a condition to put on a car with the other cattle and ship?
A. No, sir; they was not at that time.
Q. Are you quite positive about that young bull getting up that evening?
A. Yes, sir.
Q. Where were you when you saw him up?
568 A. I was there to the wreck.
Q. How far was he from you?
A. He was not a great ways off.
Q. You are satisfied it was that bull, are you?
A. Oh, I am pretty certain it was that bull, for I don't think the other bulls was there then. I think they had took them up to the stock yard.
Q. When you took him out of the wreck you just rolled him over, did you?
A. The bull was out when I got there. I helped to roll him, and some other men.
Q. How many times did you roll him over?
A. I could not say.
Q. How far did you roll him?
A. Maybe twenty feet, so as to get him away from the cars.
Q. He lay there almost lifeless, did he?
A. No; he didn't; he held up his head. We put up some boards to keep the sun off of him. Some of them carried some water and gave him. I don't remember who it was. I don't know but it was Mr. Estill.
Q. About what time of day did you help roll him over?
A. It was between eight and nine o'clock; somewheres along there; not far from eight o'clock in the morning.
Q. Some time during that afternoon you think you saw him up?
A. I think I did.
Q. Where was the large bull that was injured?
A. He was on the right-hand side of the track coming this way.
Q. How long did he remain there?

A. I could not say how long.

569 Q. Was he there at dark that night?

A. No, sir; he was not.

Q. Where was he?

A. He was up at the stock yards.

Q. Was he in the stock yard when you loaded the other cattle?

A. No, sir; he was not in the stock yard at all; he was on the outside, hitched.

Q. Was he there by the stock yard?

A. He was; yes.

Q. Till after night?

A. Till after night. He was there when the other cattle was loaded in.

Q. Where was the heifer?

A. The heifer was down the road.

Q. She was lying down?

A. I did not go down to see whether she was or not.

Q. You never saw her, then, after the first——

A. No; not after the first.

Q. Did not examine her injuries to any extent, did you?

A. No.

(Signed) GEO. MOON.

Sworn to before me and subscribed in my presence by the said George Moon this 10th day of September, 1884.

[L. S.] SYLVESTER PRICE,
Notary Public.

Deposition of Geo. Williams.

Deposition of Geo. Williams, a witness on the part and behalf of defendant, taken before Sylvester Price, a notary public in and for the county of Crawford, in the State of Ohio, at the office of J. W. Coulter, in the city of Galion, in said county and State, in the presence of Mr. Cosgrove, as counsel for the plaintiffs, and L. A. Russell, with J. W. Coulter, as counsel for defendant.

SEPTEMBER 11, 1884—9 a. m.

GEORGE WILLIAMS, of lawful age, being by me first duly sworn, as hereinafter certified, deposes and says as follows:

(By Mr. RUSSELL:)

Q. State your name, age, residence, and occupation.

570 A. George Williams; age, forty-one; residence, Randolph, New York; occupation I have none. I am living on a farm. My farm is rented.

Q. What was your residence and occupation in September of 1883?

A. My residence was at Galion, and my occupation railroading. I was engaged for the New York, Pennsylvania & Ohio railroad. I was train-master and division clerk, was my position.

Q. Where?

A. At Galion, Ohio, on the New York, Pennsylvania & Ohio.

Q. This road was then operated by the New York, Lake Erie & Western Company?

A. Yes, sir.

Q. State whether on Sunday, the 16th of September, you went from here to the cattle-train wreck at Nankin.

A. Yes, sir.

Q. What time in the day?

A. I left here between one and two o'clock in the afternoon. I reached there probably about three.

Q. How far is Nankin from Galion?

A. It is about thirty-four miles.

Q. And how far is it from Galion to Marion?

A. Twenty miles.

Q. When you got to the wreck describe what condition and location the cattle were in that were out of cars at that time.

A. I first saw those that were dead. There were four dead.

Q. What were they?

A. Four heifers; and I saw a crippled bull laying down pretty close to the track—three or four feet from the track—and went on up to the station. I saw quite a number of cattle in and around the stock-pens. They were all bulls in the stock-pens.

571 Q. How many bulls were there in the stock-pens?

A. Twenty-two, I was told, I believe, by Mr. William R. Estill, one of the plaintiffs in one of these cases.

Q. In the stock-pens they were all bulls at that time?

A. Yes, sir.

Q. What other cattle were there outside of cars?

A. There was two crippled besides the bull I spoke of. There was another bull and a heifer.

Q. Making three cripples in all?

A. Making three cripples in all that I saw.

Q. Where were they?

A. The bull was around there by the cattle-pens. I could not say that it was in the cattle-pens, but it was near there if it was not in the cattle-pens. The heifer was just outside of the cattle-pen, walking around grazing. I understood, I believe from Mr. Estill, that there was another lot down in a pasture that I did not go to see. I think there was twenty-seven head in that lot, as near as I remember.

Q. Did you have any conversation there and then with Mr. William R. Estill, who is here present now and who is one of the plaintiffs in one of these cases, in regard to the condition of the cattle that were not crippled or killed that were outside of the cars?

A. To the very best of my remembrance, Mr. Estill told me that the lot down in the pasture, as well as those in the pens—those in the pens I saw—did not seem to be crippled very much—apparently was not crippled much. He said they were badly shaken up, but he could not tell just then how badly they was crippled, but appar-

ently they was not crippled very much. I could not see that
572 the twenty-two bulls in the pen were injured any, apparently not any; seemed to walk around there all right; could not notice any marks on them.

Q. What statement, if any, in that conversation did Mr. Estill make to you in regard to the condition of these twenty-seven that he said were in another lot?

A. As I remember it, he said that apparently they were not injured very much, as he could see then. He also said that he could not tell how bad they were injured just now; they were pretty badly shaken up; something to that effect, as I remember it. I do not remember the exact words.

Q. Did those twenty-two bulls in the cattle-pen at the time you got there—the three crippled cattle that you have spoken of, the four dead heifers and the lot of twenty-seven cattle that were in a field near there—comprise all the cattle that were outside of cars at the time you got there?

A. Yes, sir; that is the way I understand it. That is all that was unloaded at the time I got there. There were some cattle in the cars that were not taken out yet.

Q. When and where were any additional cattle to those you have mentioned transferred into other cars at Nankin?

A. There were other cattle transferred about nine o'clock Sunday evening; nine to ten—somewhere about that time.

Q. How and where were they transferred?

A. They were transferred at the cattle-pens from some
573 crippled cars that they were in to other cars that were fixed up.

Q. That is, taken out of the crippled cars, you mean, and put into the stock-pen?

A. Yes, sir.

Q. And then put into other cars from the stock-pen?

A. Yes, sir.

Q. How many car-loads were so handled after you got there?

A. I do not remember exactly; there was five or six, I think.

Q. Do you know how much the cars were crippled that were unloaded into the stock-pen and the cattle from which were afterwards put into other cars?

A. The draw-heads were broken; they was not damaged much else excepting the draw-heads.

Q. Do you know how many stock cars, outside of the caboose, were demolished in that wreck or very badly crippled?

A. There was nine cars that was badly crippled and demolished.

Q. Nine stock cars?

A. Yes.

Q. By "badly crippled" you mean so crippled that they could not go forward with their loads?

A. Yes, sir; the draw-heads being broken.

Q. Of those nine do you know how many were so badly demolished that they were not repaired or rebuilt?

A. There was two, I believe, that were not repaired or rebuilt; the rest were all repaired.

Q. Did you make any observation as to cattle feed or opportunities for water for those that were outside of the cars there?

A. No, sir; I did not go to see about it myself personally.

Q. Did you observe any cattle feed there?

A. I saw cattle feed in and around the cars.

574 Q. How many drovers had Mr. Estill with him there, if you know?

A. I think there was four or five.

Cross-Ex.

Cross-examination by Mr. COSGROVE:

Q. How long did you remain there?

A. I was there three or four hours.

Q. You got there about two o'clock in the afternoon?

A. A little after; between two and three, I should think.

Q. And left that evening?

A. Yes, sir.

Q. I understood you to say that there were twenty-two that you saw in the stock-pens.

A. Yes, sir.

Q. Were they bulls or heifers?

A. They were bulls.

Q. And twenty-seven head in the pasture, what were they?

A. I did not see them; don't know what they were.

Q. Then there were the three that were crippled—two bulls and a heifer.

A. Two bulls and a heifer.

Q. And four dead heifers?

A. Four dead heifers.

Q. That makes fifty-six; those were the only ones that were taken out of the cars?

A. At the time I was there, yes, sir; that I saw.

Q. They were working on the wreck when you got there and were working when you left; were they clearing up?

A. Yes, sir.

Q. You say you had a conversation with Mr. Estell; have you stated all the conversation?

A. All that I remember of.

Q. To refresh your memory, did he or did he not ask you to go down and look at the cattle in the cars?

A. I could not say positively; I don't know but he did; I would not say positively that he did or did not; he may have done so.

575 Q. You say he said that so far as he could see, outside of the three that were crippled and the four dead ones, they were not bruised or maimed?

A. Yes, sir; we could not discover any on the lot that was in the pens there, and the others were in the same condition.

Q. So far as any exterior injuries were concerned, he was not able to state whether they had any or not—that is, he did not observe any?

A. No, sir.

Q. Did he say anything in regard to internal injuries that would take time to develop?

A. Yes, sir; he said that they may show after awhile that they were injured; could not tell just now.

Q. But, so far as he could observe at that time, that he could see no injuries other than on these seven head?

A. Yes, sir.

Q. In this conversation about its taking time to develop the probable injuries did he say anything about the probability of those cows losing their calves?

A. He spoke of this heifer. I don't remember of his speaking of the others; he spoke of this heifer that he told me, I believe, was with calf—this two-year-old heifer that was crippled; thought she would lose her calf, very likely.

Q. Do you think his remark was confined to that one?

A. That is the way I understood it; that is the best of my memory.

Q. You would not be positive, then, whether or not he referred to that one or referred to others?

A. I am positive he referred to that one, but I will not be positive that he referred to the others. Still he might have referred to those and I not understand it that way.

576 Q. How many cars did you say were burned up there?

A. There were two stock cars.

Q. How badly were those two broken?

A. Smashed to pieces, just about as near as I could tell; there was not much left.

Q. Did it break the rolling stock—the wheels?

A. The wheels were not broken that I discovered; not that I know of.

Q. Just the frame?

A. The wood-work of the car was broken up so badly that it was burned up.

Q. Were they broken by the force of the collision or were they broken up by the trainmen afterwards?

A. I could not say whether the trainmen had anything to do with it or not.

Q. What I mean is, were the cars demolished by the force of the collision or were they demolished by the trainmen after the collision occurred?

A. They were so badly demolished, likely, with the collision that they was of no account and the trainmen might have done something more with it. I could not say positively.

Q. They went to work getting the pieces of the cars out of the way so as to clear up the wreck?

A. I suppose so; I did not see that part of it.

Q. Were the other seven cars all injured about in the same degree?

A. Yes, sir; about the same; the draw-heads, principally, injured so that they could not go forward—mashed up together—the dead-woods and draw-heads.

Q. The draw-heads by the force of the collision drove together with such force as to break them?

A. Yes, sir.

577 Q. The seven cars that were injured and the two that were totally destroyed were the cars containing these fifty-six head of stock?

A. No; there was cattle in some of those cars.

Q. Still other cattle, were there?

A. There was other cattle in some of them.

Q. But what I want to get at — were these fifty-six head taken out of these nine cars?

A. Yes, sir; they came out of those that were wrecked there.

Q. How long have you been in the railroad business?

A. Nearly nineteen years.

Q. Are you able to give an opinion as to the rate of speed at which the train was travelling when the collision took place?

Objected to.

A. I could not give any idea at all about that; have no means of knowing anything about it.

Q. From your experience as a railroad man I want you to state, if you can, at what rate of speed, in your judgment, that train was running at the time of that collision in order to have produced the injury and damage to the cars it did produce.

Objected to.

A. I don't think I could answer the question.

Q. Have you no idea about it?

A. No; I have not.

Q. What is the grade there—up or down?

A. It is down grade.

Q. The train was on a down grade when it struck, was it?

A. Yes, sir.

Q. Regular 31 was side-tracked at Nankin, was it not?

A. Yes, sir.

Q. The switch was open and extra 31 ran in onto the side track, where the other train was standing?

A. Yes, sir.

Q. Struck regular 31 in the rear?

A. Yes, sir.

578 Q. Which one of the trains was it that the cars were broken in—extra 31 or regular 31?

A. They was broken in both of them.

Q. In which train were the two cars that were demolished?

A. They were in the first train, I believe—regular 31.

Q. How many of the other seven cars that were injured were in regular 31?

A. I don't believe I can tell; I don't know.

Q. And of course you could not tell how many were in extra 31?

A. I did not see the report of it. I did not make the report of it. I could not tell. They was all in there together. I could not tell which train they belonged to.

Q. Did you see the engine before it was moved?

A. Yes, sir.

Q. Which way was it headed?

A. North.

Q. It was headed across the track?

A. Across the track.

Q. How many cars were knocked off the track?

A. I cannot say positively about that—as to how many.

Q. Several of them?

A. Yes, as I remember, there were several of them knocked off. My time was taken up with Mr. Estill and his men in looking around at the stock—their complaints—and trying to do what I could for them. I did not examine particularly the condition of the wreck—the position and situation of the cars.

Q. Do you know the conductor that had charge of regular 31?

A. Yes, sir.

Q. What was his name?

A. Barr.

Q. Do you know where he is?

A. I saw him here yesterday.

Q. Who had charge of extra 31?

A. A man by the name of William Herriott.

Q. You know nothing further about how the collision occurred?

579 A. No; I don't know anything further how it occurred.

Redirect Ex.

Redirect examination:

Q. The forward part of regular 31 had gone forward before you got there, had it not?

A. Yes, sir.

Q. Remembering that fact and that the worst demolished cars were those in the rear of regular 31, and remembering where the cars were located on the track that afterwards had their loads transferred at the stock yard, are you not able by that remembrance to call to mind that the cars that were crippled at their draw-heads, and therefore had to have their loads transferred, were most of them in extra thirty-one, the rear train?

Objected to as argumentative, suggestive, and leading.

A. To the very best of my remembrance, as near as I can remember the way the cars looked, those that had the draw-heads broken—those crippled cars—were standing just above the chute.

They must have been in the rear of extra 31, from the way they stood.

Q. In the rear of extra 31 or in the forward part of extra 31? Extra 31 was the rear train, was it not?

A. Extra 31 was the rear train.

Q. That was the train that had done the running into the other train?

A. Yes, sir.

Q. Are you able to say whether the crippled draw-heads were principally in the forward part of that train or in the rear part of that train, extra 31?

A. I am unable to say positively.

Q. Your memory does not post you as to that?

A. No, sir. As I remember it, the crippled cars stood just along by the chute, all right along there together, and there was none at the east end of them, unless they had been pulled out before I reached there.

580 Q. And as to that you cannot say?

A. And as to that I cannot say, but as I remember it the crippled cars stood right along there, just west of the chute—along by the chute and west of it—and there was no cars east of them, so I should judge from that they were in the rear.

Q. They must have been in the rear train, anyway?

A. In the rear train, anyway, and there may have been some taken out from the east end of them, but I don't know anything about it; could not say.

(Signed) GEO. WILLIAMS.

Sworn to before me by said George Williams and by him subscribed in my presence September 11, 1884.

SYLVESTER PRICE,

[L. S.] *Notary Public.*

581 *Deposition of Joseph Childs.*

Deposition of Joseph Childs, taken on the part and behalf of the defendant, in the city of Boston, before Calvin P. Sampson, a notary public for the county of Suffolk, State of Massachusetts.

JOSEPH CHILDS, a witness produced on behalf of the defendant, being first duly sworn, deposes and says:

Q. 1. What is your name, what your age, what your occupation, and where do you reside?

Ans. My name is Joseph Childs; age, 43 years; occupation, veterinary surgeon, & reside in Concord, Massachusetts.

Q. 2. When did you commence practice as a veterinary?

Ans. I have always been in the business—all my life—but about twenty-five or twenty-six years ago I started alone.

Q. 3. Was your attention called to a lot of imported cattle in the year 1883, at Concord, and when for the first time and where in Concord?

Ans. It was some time in early part of August that I was called to attend a sick cow at the farm which Mr. Tower owned in part at that time.

Q. 4. By whom was your attention first called to these cattle?

Ans. Mr. Leonard's foreman; Cunningham, I think, was his name.

Q. 5. Can you give about the date when you were so called?

Ans. No, sir; not exactly; somewhere about the fore part of August.

Q. 6. What did you find to be the condition of the cattle?

582 Ans. They were all very healthy except this one.

Q. 7. What about this one?

Ans. She had aborted and was very sick; she had taken cold and had a high fever.

Q. 8. Did she recover or die?

Ans. She recovered.

Q. 9. Were others afterwards sick, and from what cause?

Ans. Yes, sir; afterwards others were taken sick from eating Paris green.

Q. 10. Did any of these die, and how many?

Ans. Five died.

Q. 11. What were the symptoms of these five while sick? Describe as fully as you can.

Ans. I did not see but one of the five while alive; the one with the calf was the fifth one. This calf was frothing at the mouth, swollen up, very dumpish, and stood off alone by itself.

Q. 12. Whether or not were these symptoms such as would naturally follow poisoning?

Objected to.

Ans. Yes, sir.

Q. 13. Was any and what examination made of the others after death?

Ans. They opened one while I was there. I examined its stomach and found it contained poison.

Q. 14. Was the poison discovered sufficient to cause death?

Ans. Yes, sir.

Q. 15. Who was present at this examination?

Ans. All of Mr. Leonard's men; I don't know who they were. A man by the name of Maher was there.

Q. 16. Did you ever see Leonard there?

Ans. Yes, sir.

583 Q. 17. Have any talk with him about the poisoning?

Objected to.

Ans. Yes, sir; we talked about it.

Q. 18. State as nearly as you can what he said and what you said to him about it. Give the words if you can; if not, then the substance.

Ans. I do not know as I can give exactly the words used. He asked me how the poison came there and what effect it would

have on his cattle, and if there none of them lost their calves he should get out of it pretty cheap.

Q. 19. What effect, if any, does Paris green have upon the fœtus?

Objected to, it not appearing that witness is competent to testify as to effect of poisons.

Ans. I don't know as I can explain it as it ought to be. There is a whitish substance which passes away from the cow. That is about as near, I guess, as I can explain it to you.

Q. 20. Whether does abortion by one cow in a herd lead to abortion in others of the same herd.

Ans. Yes, sir; it does.

Q. 21. Whether abortion from poison is as immediate as in case of blows upon or violence done to the cow or fœtus.

Ans. I think it is not.

Q. 22. Were you present where the cows were at about the time of their removal to the West?

Ans. Yes, sir.

584 Q. 23. Whether, in your judgment as a veterinary, it was prudent to remove these cows so soon after the poisoning.

Ans. I should not have wanted to remove them if they had been mine.

Q. 24. About how long in all did you attend them?

Ans. I can't say; I don't recollect. I think I had thirty-one of them kept in the yard four or five days before they were turned out. It was not a week.

Q. 25. Whether was Estell as well as Leonard there while the cows were at Concord.

Ans. Yes, sir; I think he was. I did not know the gentleman, but heard him called by that name.

Q. 26. About how far from this farm was your office?

Ans. About two miles and a quarter.

Q. 27. Were there any others of this herd affected with poison besides the five that died, and how many?

Ans. Thirty-six altogether.

Question objected to by plaintiffs' counsel as assuming a fact not yet appearing.

Cross-Ex.

Cross-examination of same witness by Mr. PIERCE, of counsel for plaintiffs:

X Q. 28. Who called you to see a sick cow at the Tower farm, as testified by you in answer to direct question 3?

Ans. Mr. Leonard's foreman, Mr. Cunningham.

X Q. 29. Where was this cow?

Ans. She was in the stable.

585 X Q. 30. Do you know how long she had been in the stable?

A. I do not.

X Q. 31. Do you know how long she was kept there?
Ans. She was kept there eight or nine days after she was sick.
X Q. 32. Do you mean eight or nine days after you saw her?
Ans. Yes, sir.
X Q. 33. Were there any other cows in the stable?
Ans. Yes, sir.
X Q. 34. Do you know to whom they belonged?
Ans. To Leonard Brothers, I supposed. They were all black cattle.
X Q. 35. How many were there in the stable?
Ans. There were eight, I think, in the stable where this cow was, and eight or 10 in the adjoining. The remainder of the stable was filled with bulls.
X Q. 36. How many animals were in the stable in which this cow was?
Ans. Eight. The stable is all together, though; it runs crosswise near the end of the main barn, as a sort of L.
X Q. 37. Do you know of your own knowledge that this cow aborted its calf?
Ans. Yes, sir.
X Q. 38. State your knowledge of this.
Ans. I caught it in my hand before it struck the floor.
X Q. 39. Had you seen the cow previous to this abortion?
Ans. A half or three-quarters of an hour before.
X Q. 40. Was the aborted calf alive?
Ans. No, sir.
X Q. 41. What was its age?
Ans. I do not know; probably two or three months,
586 possibly three, from its size.
X Q. 42. After this cow recovered, do you know of your own knowledge what became of her?
Ans. Yes, sir.
X Q. 43. What was it and how do you know it?
Ans. I saw her when she was going onto the car. That was the last I saw of her.
X Q. 44. Was she all right then?
Ans. She appeared smart, though not near so fleshy as the rest of them, and her hair was faded. She ate well then.
X Q. 45. You frequently saw the herd, did you not, while at Concord?
Ans. Yes, sir.
X Q. 46. What was the breed?
Ans. Polled Angus and Galloway, I believe.
X Q. 47. Is not this breed celebrated for its strong and rugged constitution?
Ans. I don't know as to that. They were rugged-looking cattle.
X Q. 48. Do you know anything about the breed?
Ans. No, sir.
X Q. 49. You say, in answer to question 6, that, with the exception of this cow, the herd was very healthy when you were called

to see them. Were they not remarkably strong and rugged in appearance?

Ans. I think they were.

X Q. 50. Did you see them when they were shipped from Concord?

Ans. Yes, sir.

X Q. 51. Were they not then a strong and healthy lot of cattle?

Ans. All but those that were poisoned.

587 X Q. 52. How many do you know, of your own knowledge, were poisoned?

Ans. Thirty-six.

X Q. 53. Did you treat them; and, if so, how, and how long?

Ans. Yes, sir. I treated them six or seven days. I gave them eggs and linseed oil.

X Q. 54. Did they recover?

Ans. Yes, sir; thirty-one of them did.

X Q. 55. Were they cows?

Ans. They were cows and heifers together.

X Q. 56. Do you know whether any of these were with calf; and, if so, how many?

Ans. I do not know of it myself; only as Mr. Leonard's foreman told me.

X Q. 57. You told Mr. Leonard's foreman that these animals were all right, did you not, after you had ceased your treatment of them?

Ans. They were all right as far as they could be in so short a time. I told him he could turn them out with the rest of them. They could not very well keep them in a close yard much longer.

X Q. 58. Do you know what was the cause of the abortion testified to by you; and, if so, what?

Ans. I do not know. I thought it was at the time the effect of a bruise or something got from the rest of them. I could not swear that was it.

X Q. 59. Abortion may be caused sometimes, may it not, from a slight bruise?

Ans. Yes, sir.

X Q. 60. And sometimes from a shaking up or jarring?

588 Ans. Yes, sir; I think likely. If a cow was pretty well along she might produce an abortion by getting jammed up.

X Q. 61. And sometimes from a great and sudden fright?

Ans. I don't know about that, whether fright would cause a cow to lose her calf. It might. I never heard of such a thing.

X Q. 62. Have you ever heard of cows aborting in a severe thunder storm?

Ans. I can't say that I ever did.

X Q. 63. Are there not such instances recorded in approved works on veterinary medicine?

Ans. I think I have read of mares losing their colts in thunder storms. I think, now, I have heard an old man talk about cows losing calves, too.

X Q. 64. Are not cows when with calves peculiarly sensitive to danger?

Ans. I do not know that they are.

X Q. 65. Are not cows easily frightened?

Ans. Some may be.

X Q. 66. Do you know of your own knowledge of a case of abortion produced by poison?

Ans. Yes, sir.

X Q. 67. State it.

Ans. I saw a yoke of cattle two years ago, a yoke of oxen, which had been poisoned with Paris green. I misunderstood the question. Five or six years ago there were four cows belonging to Mr. L. D. Gifford, of Chatham, New York. They got into a piece of potatoes and must have eaten the tops or they could
589 not have got the Paris green. All four aborted and one of them died.

X Q. 68. Did you see these last-named cows and treat them?

Ans. No, sir; I did not treat them. I saw one of them opened—the one that died.

X Q. 69. Where was it?

Ans. Near Chatham, on Mr. Gifford's farm.

X Q. 70. How long had it been sick?

Ans. If I recollect rightly, this one that died was sick four or five days. The others were sick some time.

X Q. 71. Had the other cows aborted when you saw this cow that died?

Ans. Yes, sir; I think they had.

X Q. 72. They had been sick less than a week, had they not?

Ans. Yes, sir; if I recollect right. I think so now.

X Q. 73. And their sickness, you say, was due to eating Paris green?

Ans. Yes, sir.

X Q. 74. And within a week from their sickness they all aborted?

Ans. Somewhere in the neighborhood of a week. I would not specify the number of days.

X Q. 75. If a cow once aborts, is not its value in the market as a breeder affected by the fact?

Ans. Yes, sir.

X Q. 76. If a cow once aborts is it not liable to abort again?

Ans. Yes, sir.

X Q. 77. Suppose a cow at Concord, Mass'tts, while with calf, is poisoned by eating Paris green, and is at once put under skilful treatment of a competent physician, and, after a course of treatment, is pronounced recovered, and afterwards, while on board of a
590 railroad car with other cattle, a collision occurred in Ohio, whereby some of the cars were thrown from the track and all of the cattle much jarred and shaken up, and this cow aborts its calf, would you not say that the reasonable inference was that the abortion was due to the collision?

Ans. No, sir; I don't think I should—not if that cow was the only

one. If she was the only one that aborted, I should lay it to the Paris green, of course.

X Q. 78. Suppose that other cows also aborted, some of which had not taken the Paris green?

Ans. I should think the railroad accident would have something to do with it. If this one only should abort, though, as I said before, I should lay it to the Paris green.

X Q. 79. Would not such an accident be a sufficient cause for an abortion?

Ans. It might be if severe enough, I presume.

X Q. 80. Could not such an accident affect a cow so that it would result in an abortion some time afterwards?

Ans. I don't know as to that. I should rather think not—not a great while afterwards.

X Q. 81. Do you say, as a veterinary surgeon, that in all cases of injury to the fœtus, uterus, and adjacent tissues abortion results at once?

Ans. Oh, no; it does not result at once in all cases.

X Q. 82. How long may there be between the injury and the abortion?

591 Ans. It might be a week or six weeks.

X Q. 83. My question as to injury to the fœtus, &c., referred to injury from blows, bruises, jamming, or falling. Did you so understand it?

Ans. Yes, sir; I understood it in that way, and poison besides. Anything that would cause it.

X Q. 84. Can you state any case coming within your own knowledge where abortion by cows occurred two weeks after poison was taken?

Ans. Yes, I can; where one died within a week. I don't think of any now just two weeks.

X Q. 85. In the cases you have referred to, where abortion was due to poison, the abortion occurred within a week, did it not, from time poison was taken?

Ans. Yes; in this one case in Chatham, New York, within a week.

X Q. 86. How do you know that some of the cattle at Concord were poisoned by eating Paris green?

Ans. I saw it in one of their stomachs. In one of the five that died.

X Q. 87. Did you analyze the contents of the stomach?

Ans. I did not.

X Q. 88. Are you competent to analyze the contents of a stomach and say whether there are traces of poison in the same?

Ans. I know by the appearance of a stomach whether there is poison in it or not.

X Q. 89. Did you make your diagnosis in this case from the appearance of the stomach?

592 Ans. No, sir; it was analyzed at Concord by Dr. Titcomb and John C. Friend, a druggist.

X Q. 90. Were you present at this analization?

Ans. I was not.

X Q. 91. So you are testifying as to this matter upon the result of an examination made by others, are you not?

Ans. By a physician; yes, sir.

X Q. 92. How many post mortems were there of the animals that died?

Ans. One.

Cross-examination closed.

Redirect.

Redirect examination by Mr. THOMAS of same witness:

R. D. Q. 93. Did you personally see marks of poisoning in this dead cow?

Ans. I did.

R. D. Q. 94. Did you report this to Mr. Leonard?

Ans. I don't recollect whether I did or not.

R. D. Q. 95. Had you at the autopsy or have you now any doubt, from what you saw, of the presence of Paris green?

A. No, sir; I have not.

R. D. Q. 96. In the case supposed by the 77th cross-interrogatory, now read to you, where one cow aborted, would not others be likely to abort from sympathy or imitation?

Ans. Yes, sir; any farmer will tell you that.

R. D. Q. 97. If a cow aborted from injury on the cars, how soon would the abortion naturally and ordinarily take place?

Ans. If she was bruised and calf was killed it might lay
593 there a week or it might come later or sooner, according to how badly she was bruised and how much injured.

R. D. Q. 98. Whether or not were the thirty-six cows and heifers apparently with calf?

Ans. Mr. Leonard's foreman told me that they were, he thought, all of them.

Objected to as not responsive, and question incompetent in re-examination.

R. D. Q. 99. In cases of abortion from Paris green poisoning, whether or not the fœtus is liable to be killed and yet not dropped for a period of five or six weeks?

A. Yes, sir.

R. D. Q. 100. Did Mr. Leonard or his foreman, Mr. Cunningham, state to you that some of the cows or heifers had aborted previous to their leaving Concord; if so, how many?

Objected to as incompetent in re-examination.

Ans. Mr. Leonard's foreman told me these heifers were all with calf, he thought. No, sir; he did not state that.

Recross-Ex.

Recross-examination by Mr. PIERCE:

R. X Q. 101. Can you state of your own knowledge a case where a cow aborted six weeks after poisoning by Paris green?

Ans. No, sir; not just six weeks.

R. X Q. 102. Can you state of your own knowledge a case of poisoning of a pregnant cow by Paris green when the fœtus was killed and not dropped within a period of six weeks?

Ans. No, sir; I cannot. Not that I think of.

JOSEPH CHILDS.

594 Subscribed and sworn to by said Joseph Childs, at Boston, this 24th day of September, A. D. 1884, before me—

[L. S.] C. P. SAMPSON,
Notary Public.

Hiram P. Worthley.

Deposition of Hiram P. Worthley, taken on the part and behalf of the defendant, before Calvin P. Sampson, a notary public within and for the county of Suffolk, in the State of Massachusetts, in Boston.

BOSTON, *September 29th*, 1884.

HIRAM P. WORTHLEY, a witness called on behalf of the defendant, being duly sworn, deposes and says:

Q. 1. What is your name and age, and where do you reside?

Ans. Hiram P. Worthley; age, forty years next month; I reside at Concord, Massachusetts.

Q. 2. What was your business in the summer of 1883?

Ans. I was a farmer and an agent of D. Whiting & Son. I run his milk car from Concord and supplied parties with grain in Concord.

Q. 3. Whether or not did you supply Leonard Brothers and Estill & Elliot with grain in the summer of 1883?

Ans. Yes, sir; as agent for Mr. Whiting. They put their orders through me and I delivered the grain.

Q. 4. Had they cattle at Concord, and with about how much grain did you furnish them daily or weekly?

Ans. We furnished them two or three tons a day while they were at Concord. They had cattle there.

595 Q. 5. How many cattle had they there?

Ans. I don't know; I never counted them; somewhere nearly 400, from report.

Q. 6. Were any of these cattle sick, and did any die there, and how many?

Ans. I don't know of but one died. I saw one that died and I saw others that showed symptoms of sickness.

Q. 7. What symptoms?

Ans. Drooping heads, ears hanging down, acted dumpish, eyes looked dull, and they were, I thought, rather stupid.

Q. 8. What were the symptoms of sickness before death in the one you saw die?

Ans. They were the last stages of life. It was lieing down in a horse stall and was breathing its last. It was in terrible agony. I never saw anything like it before or since. It would have a spasm, then lie still a moment, and then have another one.

Q. 9. Were these sick cattle cows?

Ans. Cows and heifers.

Q. 10. Were you one of those who looked for poison?

Objected to.

Ans. No.

Q. 11. What was the age of the heifers?

Ans. It would be hard for me to tell. I never saw cattle like that before. They had no horns, and were enormous. My best judgment is they were two or three years old. I am not an expert.

Q. 12. Whether or not you helped to load these cattle when they went away.

596 Ans. I did; part of them.

Q. 13. Who was Leonard's foreman in charge of the cattle?

Ans. A man by the name of Cunningham, I think, was Mr. Leonard's foreman. I did my business with him when Mr. Leonard was not there.

Q. 14. Whether or not he was there when they were loaded.

Ans. He was.

Q. 15. Was Leonard there then?

Ans. Yes, sir.

Q. 16. Whether or not any of the cattle appeared to be sick then.

Ans. Not that I discovered. I was not looking for sickness.

Q. 17. Did you converse with Leonard about the cattle?

Ans. I did.

Q. 18. Did you at that time talk with him about their sickness and what was said?

Objected to.

Ans. He and I were driving the cattle up to load the cattle. I said to Mr. Leonard, "Your cattle are looking nice." Mr. Leonard says, "Yes, they are looking very fine, but where I shall lose money is on those cattle that ate the Paris green. Every cow that ate the Paris green will lose her calf." I said I should be very sorry, as I have taken a great interest in the cattle. The cattle made a break then and we had to separate to drive them up, and the conversation ended.

Q. 19. Had you any personal knowledge of the discovery of Paris green?

Ans. No, sir.

Q. 20. Have you ever dealt in cattle?

Ans. Yes, sir.

597 Q. 21. Where and to what extent?

Ans. At Concord. I have bought and sold cows—not very extensively.

Q. 22. Have you any knowledge of cows or heifers aborting their calves?

Ans. Yes.

Q. 23. Do you know what is the proper course to take with other cows when one cow, associated with others, aborts?

Objected to, it not appearing that his knowledge is derived from personal experience, and, so far as it appears, it may be due to gossip.

Ans. No, sir; not the proper course. It was always my custom to remove the one that aborted immediately from the rest.

Last part of answer objected to as not responsive.

Q. 24. Why do you remove the cow that has aborted? What effect, if any, has it on the others?

Objected to.

Ans. We think the others are more apt to abort. I think the disease is contagious in a herd of cattle. I don't know what others think.

Q. 25. Have you had any personal experience where, after one cow had aborted, others associated with her also abort?

Ans. Yes, sir.

Adjourned to two o'clock p. m.

TWO O'CLOCK P. M.

Met pursuant to adjournment.

Counsel present as before.

Cross-Ex.

Cross-examination of same witness by Mr. PIERCE:

X Q. 26. Did you examine the animals that you say you saw sick?

Ans. No, sir; nothing more than to look at them.

598 X Q. 27. How are you able to swear at this late day that they were cows and heifers?

Ans. Because I saw them. I looked at them.

X Q. 28. Did you look to see if they were cows and heifers?

Ans. I did, sir.

X Q. 29. Why?

Ans. Because I knew there were cows and heifers in that lot.

X Q. 30. What interest had you in ascertaining whether these were cows and heifers?

Ans. Not any.

X Q. 31. You say the size of the animals in the herd was enormous. Were they not a remarkably strong and rugged looking lot of cattle?

Ans. I should say they were previous to the time I mentioned

seeing them when they were sick. They did not look very rugged then.

X Q. 32. I did not refer especially to the few you saw sick, but to the general character of the herd. Was not the general character of the herd such as you have described?

Ans. Yes, sir.

X Q. 33. Are you willing to swear positively that you have stated the very words used by you and Mr. Leonard in the conversation testified to?

Ans. I am.

X Q. 34. Please state it again in full.

Ans. We had some general conversation before we approached this subject. Then I said, "Mr. Leonard, your cattle are looking very nice." He says, "Yes, sir; they are looking very fine; but where I shall lose money is on those cows that ate the Paris green. They will all lose their calves."

599 X Q. 35. Did you make any memorandum of this conversation?

Ans. I did not.

X Q. 36. How long after the conversation was your attention first called to it?

Ans. It was not called to it at all until I heard he had sued the railroad for damages.

X Q. 37. When was that?

Ans. Some time last spring. I have not any dates. April or May I think I first heard it.

X Q. 38. By whom was your attention then called to it?

Ans. I can't tell whether Mr. Tower first spoke of it or Dr. Childs. I would not be positive.

X Q. 39. Did Mr. Shepard, the gentleman who is now present with Mr. Baldwin, president of defendant railroad, speak to you about it?

Ans. He spoke to me the other day when I came in here. He did not speak to me about the conversation because he did not know of the conversation.

X Q. 40. Is that the first time you ever had any talk with him about this suit?

Ans. Yes, sir; that is the first time I ever met him, to my knowledge.

X Q. 41. How many cows have you bought and sold?

Ans. I could not tell you.

X Q. 42. About how many?

Ans. I have been dealing in cows, more or less, for over twenty years; some years more than others. It might be 500 or it might be 300. I have bought 20 or 30 at one sale and all the way from one to five at other times. It is a hard question for me to answer.

600 X Q. 43. How many have you owned at one time?

Ans. I was an equal partner when we owned a trifle over sixty cows and heifers nearly matured.

X Q. 44. What was the cause of the abortion in the case of the cows aborting you have spoken of?

Ans. I could not tell you.

X Q. 45. Was it from disease or accident?

Ans. There was no accident. It might have been from something they ate. We generally think it is something they have eaten which causes abortion. I am no veterinary and cannot swear to that. We generally think that one cow aborting makes others abort. It is something we don't know—odor or something else.

X Q. 46. Is not abortion often the result of injury to the cow?

Ans. Yes, sir.

X Q. 47. I mean injury by blows—falling or jarring. Did you so understand it?

Ans. I did not. I thought it meant injury to the cows afterwards.

X Q. 48. You mean that cows which abort are therefore injured in their market value. Is that so?

Ans. Yes, sir; I consider it so.

X Q. 49. If a cow aborts once there is greater liability of its aborting again, is there not?

Ans. I think so, from my experience.

X Q. 50. And if this fact of abortion is known the value of the cow in the market as a breeder is much lessened, is it not?

Ans. It would be by me. Perhaps it would be by everybody as a breeder.

601 X Q. 51. Will not accident, severe shaking, or violent treatment of a cow with calf be liable to produce abortion?

Ans. I don't know. I never had a case of that kind.

X Q. 52. From your experience with cows in that condition, would you not say that it would?

Objected to.

Ans. I don't know anything in regard to that. It might in some cases. I have had cows brought from Brighton that calved all right. Some sudden movement might produce abortion.

X Q. 53. What was the cause of the first abortion, in the case where you say you had personal experience of a cow aborting, and others associated with the herd then aborting?

Objected to.

Ans. I don't know.

X Q. 54. Where and when was this case you refer to?

Ans. In Concord. I can't tell the date of it.

X Q. 55. About when?

Ans. It was not far from eight years ago. I can't get at it much more definitely. I remember the circumstances well. It was in the same barn where these cattle of Leonards' were.

X Q. 56. State the number of the herd at that time.

Ans. It was as near thirty as I can remember. The string where they were tied up would hold thirty-two, and it was nearly full. We generally kept the string full at that time.

X Q. 57. Were they all in the stable?

Ans. Yes, sir; at the time the abortion commenced.

X Q. 58. Were they all cows and with calves?

602 Ans. They were all cows, but not all with calf. Some of them had previously calfed.

X Q. 59. How long had they been in the stable?

Ans. I forget the month. It was in winter, and I am quite certain it was February. If it was, they had been in three months—since the first of November.

X Q. 60. Who owned them?

Ans. Worthley & Brown.

X Q. 61. Where did they come from?

Ans. I don't know.

X Q. 62. How many cows aborted?

Ans. Three, to my certain knowledge, and I wouldn't be positive there were not four.

X Q. 63. How many were with calf at that time?

Ans. I can't tell you.

X Q. 64. State to the best of your knowledge.

Ans. Eight, to the best of my judgment.

X Q. 65. Had not the cows that aborted all eaten the same food?

Ans. Yes, as nearly as we could feed them with hay.

X Q. 66. How soon after the first abortion did the others occur?

Ans. I think the first one was about nine or ten days. The second was nine or ten days after the first.

Cross-examination closed.

Redirect.

Redirect examination by Mr. THOMAS:

R. D. Q. 67. Referring to the cows *injured* about in X questions 62 and 65, had they met with any accident?

Ans. No, sir; they had not.

R. D. Q. 68. Referring to your answer to X question 47, do

603 you think breaking a cow's leg would cause her to abort?

Objected to.

Ans. It would depend on how it was broken, somewhat. You might shake her up enough to shake the calf out of her or you might take a stick and break it.

R. D. Q. 69. Did you ever have any experience of the effect on cows with calf of being shaken up on a railroad, as inquired about in your cross-examination?

Objected to as assuming something not in the question.

Ans. No, sir.

R. D. Q. 70. Have you ever had any cattle injured in any way on a railroad where there was abortion?

Objected to.

Ans. No, sir.

R. D. Q. 71. Have you any difficulty in telling cows and heifers from bulls and oxen, as *injured* about early in your cross-examination, without a special examination?

Ans. I never had.

R. D. Q. 72. Have you ever shipped any cattle over a railroad?

A. No, sir.

R. D. Q. 73. Have you ever travelled in charge of any cattle over a railroad?

Ans. No, sir.

R. D. Q. 74. In the case of the abortion of the three cows spoken of, how soon after the first abortion were the cows separated?

Objected to.

Ans. The very next day after we found that one had aborted.

604 R. D. Q. 75. Do you know of any other case in which cows aborted from imitation or contagion, and what other?

Objected to on the ground that the matter has already been inquired into in the examination-in-chief.

Ans. I don't know any personally.

Recross-Ex.

Recross-examination by Mr. PIERCE:

R. X Q. 76. Were you with the cows that aborted all the time they were in the stable previous to the abortion?

Ans. No, sir.

R. X Q. 77. Were not these cows some of the time driven out of the stable?

Ans. They were turned out every day.

R. X Q. 78. How are you able to swear from your own knowledge that these cows that aborted had not met with any accident?

Ans. Well, sir; I took care of them myself and handled them.

R. X Q. 79. But did you not say you were not with them all the time?

Ans. Yes, sir. I did not stay in the stable nights when the cows were tied up and no one else in the stable.

R. X Q. 80. Will you swear you were with them every minute of the day while they were there before the abortion?

Ans. No, sir.

R. X Q. 81. Were you with them when and while they were turned out every day?

Ans. Yes, sir.

605 R. X Q. 82. Can you swear positively that during your absence these cows received no injury, met with no accident, were kicked by no one?

Ans. Yes, sir; no person entered the barn. Another cow might have kicked one while I was at my meals, possibly; but no person had anything to do with them but me. Of course I can't tell what other cows did tied up beside them.

R. X Q. 83. Was it not possible for some one to enter the barn while you were away?

Ans. It would be almost impossible.

R. X Q. 84. How so?

Ans. The barn was kept locked when I was not in it, while I took care of it.

R. X Q. 85. Was it kept locked during the daytime when you say you were away?

Ans. When I went out to my meals I locked the barn. If I went from one barn to the other I locked it. We had two barns.

R. X Q. 86. Did you not have an assistant in the care of the cows?

Ans. It was my business seven days in the week.

R. X Q. 87. Could not the barn have been unlocked in your absence?

Ans. I suppose it could have. They would have to pick the lock. I carried the key myself.

R. X Q. 88. Did not your partner have access to the cows?

Ans. No, sir; only at night — at morning. He had nothing to do with these cows. There was only one key and I carried it.

R. X Q. 89. Are you now engaged in service of a railroad?

Objected to.

Ans. No, sir.

606 R. X Q. 90. What is your business?

Ans. My business is a farmer, and I run on Whiting's milk car to Boston as his agent. I do no business for the railroad whatever.

R. X Q. 91. Have you ever been in a railroad collision where cars were wrecked?

Objected to.

Ans. No, sir; not when cars were wrecked. I have been off the rails several times.

Redirect.

Redirect examination by Mr. THOMAS:

R. D. Q. 92. Had the cows you owned and which have been so long inquired about ever been on a railroad, so far as you know?

Ans. No, sir; the most of them we raised.

Recross.

Recross-examination by Mr. PIERCE:

R. X Q. 93. I understood you to say you had had these cows about three months and did not know where they came from. Do you say now you raised them?

Ans. I said I don't know where all of them came from. Some of them we raised; others came from New Hampshire, and about them I don't know. I guess I did not say I knew where all of them came from.

R. X Q. 94. And some of these cows in the stable were bought and some were raised; is that so?

Ans. Yes, sir.

R. X Q. 95. Were the cows that aborted purchased or raised, if you know?

Ans. One of them was bought and two of them were raised.

HIRAM P. WORTHLEY.

607 Subscribed and sworn to by said Hiram P. Worthley this 29th day of September, A. D. 1884, before me—

C. P. HAMPTON,
[L. S.] *Notary Public.*

M. J. Green.

Deposition of Melvin J. Green on the part and behalf of the defendant, taken before Calvin P. Sampson, a notary public within and for the county of Suffolk, in the State of Massachusetts, at his office, in Boston.

Q. 1. What is your name, age, residence, and occupation?

Ans. Melvin J. Green; age, forty-six years; residence, at Waltham; I am in the transportation business.

Q. 2. Did you in the summer of 1883 visit the cattle quarantine at Concord and see any cattle there belonging to Leonard Brothers?

Ans. I can't give the dates. I was there on the day when Mr. Leonard took them out from Waltham quarantine to Concord. Some of the cattle were going out. I don't know how many were there. The cattle were driven to Concord from quarantine.

Q. 3. Whether or not did you see and converse with Mr. Leonard about the cattle there?

A. I saw Mr. Leonard and talked with him about the cattle on that day.

Q. 4. If he made any complaint about the treatment the cattle had received at the hands of the Government, please state what he said.

Objected to.

608 Ans. He stated that he had been badly treated by Government, and that he had had to make one or two trips to Washington to get justice for his cattle; that it was through his trips to Washington that he had got them removed from Waltham to Concord; the cattle were suffering so much at Waltham. He said he could not get permit from the officers here to remove the cattle, and had to go to Washington to get it. I do not give the exact words, but the substance of what Mr. Leonard said. Mr. Leonard talks so much, it would be very difficult to give his exact words. He had a great many grievances to talk over. I could have given the words he used better a year ago. My recollection on the subject is clear, but I could not give his exact words.

Q. 5. If Mr. Leonard said anything about these cattle having suffered at Waltham quarantine, state what he said about it.

Objected to.

Ans. I can't give the particulars.

Q. 6. Whether or not was anything said by him about want of proper accommodation?

Objected to.

Ans. Yes; in substance; that was the drift of it.

Q. 7. Whether or not did you see Mr. Leonard about the time the cattle were taken away from Concord?

Ans. I saw him previous to their going.

Q. 8. Did you have any conversation at that time about
609 the cattle; and, if so, what was it? State it all.

Ans. I did have conversation with him about the cattle. The object with me was to see about the transportation of the cattle. (This sentence objected to by plaintiffs.) He spoke of their having been poisoned; that some had died; others, fortunately, had not died; that those cows having been poisoned would probably all lose their calves in consequence of the poison; that some had lost their calves, and probably all would that had been poisoned.

Q. 9. Were you at Concord when the cattle were put on the cars to be taken away?

Ans. I was there the day they were being driven in from Concord to the station for the cars; I was there the day before they left; they took the train on the following day.

Answer objected to as not responsive.

Cross-Ex.

Cross-examination by Mr. PIERCE, of counsel for plaintiffs:

X Q. 10. In what railroad are you employed?

Ans. That is hard to answer. There are so many different roads on our lines. Our general manager could answer better than I that question.

X Q. 11. Is the Erie railroad—the defendant—one of the roads?

Ans. I believe so. I don't know enough about the suit to answer any of those questions.

X Q. 12. How long have you been in the employ of railroads?

Ans. Over twenty years.

610 X Q. 13. Previous to your examination-in-chief to-day, with whom had you talked in regard to your testimony in this case?

Ans. I talked with Mr. Baldwin, the gentleman present.

X Q. 14. Who is Mr. Baldwin?

Ans. Supposed to be the general live-stock agent of the Erie railroad and I don't know what other roads.

X Q. 15. Is he not the president of the Erie railroad?

Ans. I think I will object now. I think I have answered in regard to Mr. Baldwin's title; that is all I know about it.

X Q. 16. Do you not know he is president of this road?

Ans. I do not know anything of the kind.

X Q. 17. Previous to your examination to-day were you aware of the nature of the suit by Leonard against the Erie railroad?

Ans. I have understood he had sued the Erie road for damages.

X Q. 18. Damages for what?

Ans. Damages on his cattle.

X Q. 19. You heard, did you not, that they were injured or claimed to have been injured in a railroad collision?

Ans. I heard two or three of them were.

X Q. 20. You also heard, did you not, that Mr. Leonard claimed that some of the cows aborted their calves in consequence of injury received at the collision?

Objected to by defendant.

611 Ans. Mr. Baldwin told me he had made a claim of that kind.

M. J. GREEN.

Examination closed.

Subscribed and sworn to by said Melvin J. Green this eighth day of October, A. D. 1884, before me—

C. P. SAMPSON,
[L. S.] *Notary Public.*

W. S. Maker.

Deposition of Winfield S. Maker on the part and behalf of the defendant, taken before Calvin P. Sampson, a notary public within and for the county of Suffolk, in the State of Massachusetts, at his office, in Boston.

Q. 1. What is your name, what your age, where do you reside, and what is your occupation?

Ans. Winfield S. Maker; age, thirty-three years. I reside in Concord, Massachusetts; saloon business.

Q. 2. Whether or not did you see at Concord in summer and autumn of 1883 a lot of imported cattle.

Ans. Yes, sir.

Q. 3. When and where did you first see them, and about how many were there in the lot?

Ans. I saw them first at Concord; somewhere about three hundred and ninety-odd, I believe, in the lot.

Q. 4. What was their color?

Ans. Black.

Q. 5. Whether or not was there any other similar lot there in the year 1883.

Ans. I think not.

Q. 6. Did you see Mr. Leonard there?

A. Yes, sir.

612 Q. 7. Had he a foreman in charge, and what was his name?

Ans. His name was Cunningham.

Q. 8. Were any of these cattle sick while there?

Objected to as leading.

Q. 9. Did you see them while they were sick?

Objected to as leading.

Ans. Yes, sir.

Q. 10. Whether or not did any cow abort its calf there.

Ans. Yes, sir.

Q. 11. Did you see the cow, and where was it?

Ans. I saw it; in the stable.

Q. 12. Whether or not was that cow separated from the rest.

Ans. No, sir.

Q. 13. How were the cows cared for? State fully.

Ans. I should say they were cared for pretty well.

Q. 14. How about the accommodations for the cows while there?

Ans. The first part of the season it was good; the latter part very poor.

Q. 15. In what respects poor?

Ans. They had no water.

Q. 16. Did anything happen to the cows, and what? State what you saw.

Ans. They used to get out and get mixed up in different lots. They got into the pond and got mired and had to be got out—pulled out by ropes.

Q. 17. How many other cows were in the stable where this one aborted, and why were they placed there?

Ans. Six or seven in there on different complaints; some
613 with lame feet, some sick and would not eat. I don't know exactly what ailed them, but they wouldn't eat and were growing poor very fast.

Q. 18. How soon after their arrival at Concord did this cow abort?

Ans. About six or eight to ten days.

Q. 19. State if you know whether any of them died at Concord.

Ans. Yes, sir.

Q. 20. How many, and whether they were buried there?

Last part of question objected to.

Ans. Five or six. They were buried there.

Q. 21. Has any one of them been taken up recently and when?

Objected to.

Ans. Yes, sir; there was one uncovered. I should say it was about a week ago. I don't remember exactly what day it was. It was a week ago last Saturday, I think.

Q. 22. Were you present at the exhumation? Who else was present besides?

Ans. Yes, sir. Mr. Shepard and Dr. Childs was there and a veterinary surgeon, whose name I don't remember now; a man of the name of George Gallagher, too.

Q. 23. Was the surgeon's name Harrington?

Ans. I don't remember. I was introduced to him, but I don't remember his name now.

Q. 24. Was the body of the cow taken up, opened, and by whom?

Objected to as leading.

Ans. Yes; by Dr. Childs.

Q. 25. Whether or not did you see the same cow buried there soon after her death.

Objected to.

Ans. Yes, sir.

614 Q. 26. Whether or not did you see any Paris green in the field where the cows were, and when did you first see it?

Ans. Yes, sir; I saw it on a Sunday. I don't remember exactly the day of the month.

Q. 27. By what fact or circumstances was your attention first called to it and where was it?

Ans. We found the cattle dying and looked around to see what the trouble was. Some men were sent down into the field and came back and told me that they had found Paris green, and I went right down and looked at it. The next day we found another package of it in another lot.

Q. 28. Whether were the cattle in the field where you first saw it. Where was the Paris green when you first saw it?

First part of question objected to.

Ans. The cattle were in the same field and the Paris green was in the lower field, two-thirds of the length of the field down behind the barn.

Q. 29. Whether or not did you see any indication upon the cattle of having eaten the Paris green, and what indication.

Ans. I did not see anything until they were taken sick.

Q. 30. Was the cow exhumed a week ago Saturday, one that was supposed to have died from this poison?

Objected to.

Ans. Yes, sir.

Q. 31. In what manner were the ropes used in pulling cows from mire in the pond spoken of? How far were they hauled or

615 pulled and who pulled them out?

Ans. They were in the mud about seventy-five feet from the shore. We put out planks and walked out on them as far as we dared and then lassoed the cows. Only the heads were sticking out. Then seven or eight of us got hold of the ropes and hauled them out of the mud. They had no horns.

Q. 32. You have spoken of five having died. Were the others sick, and how many?

Objected to.

Ans. There were about thirty sick. I think we doctored thirty.

Q. 33. Did you talk with Mr. Leonard about the cows?

Ans. Not very much; about the shipping, that is all.
Q. 34. Whether or not did any of Leonard's men board with you?
Ans. Yes, sir.
Q. 35. How many men had he there besides Cunningham?
Ans. Five, I think.

Cross-Ex.

Cross-examination by Mr. BURKE, of counsel for plaintiffs:

X Q. 36. Do you keep a saloon yourself; if so, how long have you kept it at Concord?
Ans. Since the first of April.
X Q. 37. What was your business prior to that?
Ans. It has always been the hotel business.
X Q. 38. What was your business in August and September, 1883?
Ans. Hotel.
X Q. 39. Where did you keep hotel then?
Ans. Palatka, Florida.
616 X Q. 40. Where were you in August and September, 1883?
Ans. I was in Concord.
X. Q. 41. How long had you been there and what were you doing there?
Ans. I was living there during the summer. I came in June.
X Q. 42. Did you have any business in Concord or in Massachusetts during these months?
Ans. No, sir.
X Q. 43. How many of these cattle that were mired did you personally assist in helping from the pond?
Ans. Two.
X Q. 44. How many of these cattle did you see mired?
Ans. Two.
X Q. 45. You say that when the Paris green was found you were told of it and went to see it. Who told you it was Paris green?
Ans. I don't remember that any one said it was Paris green. I knew myself by the looks of it that it was Paris green. Some of the men told me about it; I don't know exactly which one.
X Q. 46. How many of these cattle did you personally see buried?
Ans. I saw five.

Cross-examination closed.

Redirect.

Redirect examination by Mr. THOMAS:

R. D. Q. 47. Whether was the one taken up as you say one of these five.
Ans. Yes, sir.
R. D. Q. 48. In question 39 you were asked where you kept then, and you answered Palatka, Florida. To what time did you understand "then" to refer?

X Q. 20. When did you sell it?

Ans. Last May.

X Q. 21. Did you bargain with Mr. Leonard and Estell for the use of the farm by them?

Ans. Yes; I think through them I bargained. I went to see the collector and we could not agree upon the price. I asked $1,000 and he offered me $500. Then Leonard came to see me and I agreed to take $600. He accepted and we closed the bargain.

X Q. 22. How many acres were there in this farm?

Ans. I think two hundred and thirty-five.

X Q. 23. State how much was pasturage and how much tillage.

Ans. Pasturage? Well they ran over the woodland and all. I should judge there were 75 to 100 acres; and there were some one hundred acres or more of mowing and tillage land.

X Q. 24. Was the tillage land fenced from the pasturage?

Ans. What we called pasture was where the cattle ran throughout the season. These cattle ran over the tillage land. It was fenced from the pasturage.

X Q. 25. Did the herd roam on the pasturage or the tillage land?

Ans. They had them in different lots. There were 125 in what I called the pasturage and 150 or more in the mowing or tillage ground where the Paris green was found.

621 X Q. 26. Was the herd divided by fences?

Ans. Yes.

X Q. 27. Have you a plan of the farm with you?

Ans. I have not.

X Q. 28. Have you a plan of the farm?

Ans. I gave it to the man we sold it to, John Brewster. He has the plan, I suppose.

X Q. 29. What was planted in the tillage ground in which you say part of the herd roamed?

Ans. A few potatoes were planted there and some millet was sowed. The man who took care of the buildings planted a garden and I sowed the rest in millet.

X Q. 30. How large a patch of potatoes was planted there?

Ans. There might have been two or three rods; a small patch.

X Q. 31. Please answer this question so that we can know, if you know, the size of this potato patch.

Ans. It might have been three or four rods long and a couple wide; It was near the buildings; near the barn.

X Q. 32. Was this potato patch fenced off from the rest of the field?

Ans. It was not. There were two lots and they put cattle in the lower lot until I could cut the millet, and the potatoes were dug before the cattle went in there.

X Q. 33. Who planted these potatoes?

Ans. Mr. Joseph Dakin.

X Q. 34. Do you know where he is?

Ans. He is on the place now.

622 X. Q. 35. How many cattle did you see dead belonging to this herd?

Ans. I don't know as I saw more than two of them.

X Q. 36 When you testified that there were five dead you testified, did you not, to what you did not know?

Ans. I saw two dead and saw them burying one or two more. I had a large manure heap near the barn and found they had buried one there, and also had buried one in the sand bank and another one in a different part of the field. That makes three.

X Q. 37. Did you see them bury one in the manure?

Ans. I did not.

X Q. 38. Have you any personal knowledge that this one belonged to the herd?

Ans. I have no knowledge other than from the color of the creature.

X Q. 39. Did you see the two buried in the other part of the field?

Ans. I saw them lieing back of the barn dead, and saw the men dragging their bodies away. I was not there when they were put into the ground.

X Q. 40. Have you any personal knowledge of there being thirty placed in the yard?

Ans. I don't know as I counted them. I judged there were thirty or more in the yard driven up that Sunday.

X Q. 41. What part of the farm did they come from, if you know?

Ans. They came out of the lot where the Paris green was found.

X Q. 42. How do you know?

623 Ans. I was there. I saw them drive them up and put them into the yard.

X Q. 43. Were you present when the Paris green was found?

Ans. I was on the field, looking around with the rest of them, when this man found it, and I went up to see it.

X Q. 44. Who was the man who you say found it, and where does he live?

Ans. Fred. Hosmer. He lives in Concord.

X Q. 45. Was it in his hands when you saw it?

Ans. Yes; he was looking at it. Quite a number were there.

X Q. 46. Was it in paper?

Ans. Yes.

X Q. 47. How large a quantity?

Ans. I think about a pound; I guess so. There might have been more or less.

X Q. 48. Was the paper open when you saw it in his hands?

Ans. Yes.

X Q. 49. Do you know who opened it?

Ans. I don't know.

X Q. 50. Was the paper dry?

Ans. Yes.

X Q. 51. And the contents?

Ans. Yes.

X Q. 52. Where was the man standing when he showed you this paper?

Ans. There were quite a number standing around very near the spot where it was picked up.

X Q. 53. I do not ask you when it was picked up, as you have already said you know nothing except what was told you, but I ask you where the man was standing when he showed you the paper and contents.

624 Ans. Near the spot where it was picked up in the field there. As I said before, ten or fifteen rods from the brook.

X Q. 54. Did you take any of the contents of this paper to a chemist or expert to examine?

Ans. I did not.

X Q. 55. Were the contents of this paper buried; and, if so, when, by whom, and where?

Ans. Buried near the spot w-ere it was found. I could not tell you by which one of the men now.

X Q. 56. Did you see it buried?

Ans. I did not.

X Q. 57. So you have no personal knowledge of what became of it, have you?

Ans. No; I don't know as I have.

X Q. 58. Have you bought and sold cows?

Ans. Yes.

X Q. 59. Are you a farmer; and, if so, how long have you been one?

Ans. Always been on a farm.

X Q. 60. State as nearly as you can the number of cows you have owned.

Ans. I could not tell. I have owned a great many. I used to go to New Hampshire and Vermont and pick up cattle and drive them to Brighton to sell.

X Q. 61. Have you had any knowledge of cows aborting?

Ans. I never had a great many. I have had some.

X Q. 62. Do you not understand that if a cow once aborts it is liable to abort again?

Ans. Yes.

625 X Q. 63. Would not the fact that a cow has aborted injure her value in the market as a breeder?

A. Yes.

Cross-examination closed.

Redirect.

Redirect examination by Mr. THOMAS:

R. D. Q. 64. Were there any other cattle than those of Leonard's and Estell's in the same pasture where the Paris green was found?

Ans. No other cattle.

Question objected to as assuming a fact not yet proved.

R. D. Q. 65. Was there anything in the appearance of the cattle besides the sickness which led to the search, and what was it?

Objected to as leading and incompetent on re-examination, and also assuming a fact not proven.

Ans. Yes, sir; the men told me they found the cattle had something green on their noses. We concluded it was Paris green, and went and searched for it.

Answer objected to as being hearsay and as improper for the witness to state, especially after the attention had been called to the difference between personal knowledge and hearsay testimony.

R. D. Q. 66. Were Cunningham and Leonard there at the time or either of them?

Ans. They were not there at that time.

R. D. Q. 67. Whether or not there was any Paris green on the ground at or near the place where the paper parcel was found?

Ans. It was scattered around a little where the cattle had stepped on it or something.

626 R. D. Q. 68. Whether or not where a cow aborts she should be removed immediately from the others?

Objected to.

Ans. Yes; I think so.

R. D. Q. 69. What effect does the abortion of one cow in a herd have upon other pregnant cows if she is not removed from among them?

Objected to.

Ans. Sometimes it affects the whole herd.

R. D. Q. 70. In what way?

Objected to.

Ans. I could not say in what way unless by sympathy or some such thing as scent.

R. D. Q. 71. What does it cause the others to do?

Objected to.

Ans. It causes abortion.

Recross-Ex.

Recross-examination by Mr. PIERCE:

R. X Q. 72. When the paper was opened by the finder might not some of its contents have been spilt on the ground?

Ans. It might have. I don't think it could have been, because we were very careful about handling it.

R. X Q. 73. Have you not said you were not present when the paper was opened?

Ans. I think I did say so.

R. X Q. 74. Then how could you say of your own knowledge how carefully the paper was handled before you saw it?

Ans. The cattle I supposed broke the paper open. I was in the

different part of the field when it was picked up. I did not
627 see it opened.

First sentence objected to as not responsive.

R. X Q. 75. Do you know of your own knowledge of an instance where one cow aborted and the abortion went through the whole herd in consequence of this one abortion?

Ans. No; I don't know of my own knowledge. I know by neighbors who have told me.

Last part of answer objected to as not responsive and as hearsay.

R. X Q. 76. Was the paper you have spoken of open when you did first see it?

Ans. Yes.

ABEL D. CLARK.

Subscribed and sworn to by said Abel D. Clark this 29th day of September, A. D. 1884, before me—

C. P. SAMPSON,
[L. S.] *Notary Public.*

Alonzo Tower.

Deposition of Alonzo Tower, witness on the part and behalf of the defendant, taken before Calvin P. Sampson, notary public within and for the county of Suffolk, State of Massachusetts, at his office, in Boston.

BOSTON, *Sept. 24th*, 1884.

ALONZO TOWER, a witness called on behalf of the defendant, being first duly sworn, deposes and says:

Q. 1. What is your name, what your age, what your occu-
628 pation, and where do you reside?

Ans. My name is Alonzo Tower, of Concord, Massachusetts; age, forty-seven years; occupation, a trader. Hay and grain business has been my last business.

Q. 2. Have you a farm at Concord and do you have cattle on your farm?

Ans. No, sir; I have not now.

Q. 3. Had you a farm at Concord in July and August, 1883, and what experience, if any, have you had with cattle?

Ans. Yes, sir. I was a part owner in a farm there at that time. I have traded in and owned cattle for a good many years past.

Q. 4. Whether or not a lot of imported cattle were at your said farm in July and August, 1883, and about how many.

Ans. Yes; there was a lot there. There were, I think, in the neighborhood of three hundred and eighty. I am not sure whether two hundred and eighty or three hundred and eighty.

Q. 5. To whom did they belong?

Ans. To Leonard Brothers and Estill.

Q. 6. Whether or not did you see one of the Leonards at that time.

Ans. I did. Previous to their going up there and after they were up there before they were shipped West I saw him.

Q. 7. Whether you were at home all the time while they
629 were at your farm or were you absent a part of the time. State the circumstances.

Ans. When they were driven to the farm I was away West, and I got home two weeks or ten days before they were taken away.

Q. 8. How far is your farm from the cattle quarantine at Waltham?

Ans. It is twelve miles and a half, I should say.

Q. 9. Were the cattle while at your place at any time in a pasture where they had access to Paris green?

Ans. Yes, sir.

Q. 10. Do you know what effect, if any, taking Paris green has upon cows while pregnant?

Ans. No, sir. All I know is what I have been told by veterinarys.

Plaintiffs' counsel objects to witness stating what he has been told.

Q. 11. Who had charge of these cattle while on your farm?

Ans. Well, Leonard Brothers had their foreman there. Mr. Abel D. Clark, who is the owner of the farm with me, looked after the affairs while I was away.

Q. 12. Were any of the cattle sick while there? Did any die there?

Ans. I could not swear to it personally.

Q. 13. Were any buried there, and how many?

Ans. I could not say.

Q. 14. Did you ever have any conversation with Leonard about their sickness?

Ans. I did.

Q. 15. What was said? State all that you recollect.

630 Ans. He merely spoke about the poison which the cattle got, and was afraid he would have more trouble with those which had not died, and was much afraid the cows with calves would abort.

Plaintiffs' counsel objects to the answer as not responsive to the question, the witness not stating the conversation, but undertaking to draw his inference from it.

Q. 16. State as nearly as you can recollect all that Mr. Leonard said to you and that you said to him about the sickness of the cows. Give the words used if you can, and, if not, the substance of what was said. State fully.

Ans. Well, I think I have given about everything he said, because I was in hopes that all he would suffer was from those cattle that had died. He was afraid of more trouble.

Q. 17. Please to state what he said, as nearly as you can, in the words he used.

Ans. I think I did in the first answer. Of course it is a good

while ago, and I can't remember word for word what he said, but that is the substance of it.

Q. 18. What did he say about their having taken Paris green?

Objected to.

Ans. He said he was unfortunate in having his cattle poisoned there or finding that Paris green, or something of that kind.

631 Q. 19. Whether or not anything was said about one of the cows then having aborted.

Ans. I don't remember anything particular about any one cow.

Cross-Ex.

Cross-examination of same witness by EDWARD H. PIERCE, Esq., of counsel for plaintiffs:

X Q. 20. Have you had any talk with any person previous to your giving your testimony to-day in regard to what you could testify to; and, if so, with whom and where and when?

Ans. I had some conversation with the officials of the Fitchburg railroad, I think, in January. I would not be sure.

X Q. 21. What is the name of this official?

Ans. C. L. Hartwell, I think, was the only official there.

X Q. 22. Have you had any talk with any other person in regard to this matter?

Ans. No, sir; not that I recollect.

X Q. 23. What interest had you in this farm at Concord?

Ans. I owned one-half.

X Q. 24. When and to whom did you sell your one-half interest?

Ans. I sold to Abel D. Clark, but I can't tell when.

X Q. 25. Where does Abel D. Clark live?

Ans. Concord, Massachusetts.

X Q. 26. What is his business?

Ans. Farmer.

X Q. 27. What is your business now?

Ans. I am not in any business at the present time. I got through with the hay and grain business two or three months ago.

632 X Q. 28. Do you know of your own knowledge that these cattle had access to Paris green while in your pasture?

Ans. No, sir.

X Q. 29. Did you understand while giving your testimony-in-chief that you could only testify to facts within your personal knowledge?

Ans. That one question that Mr. Thomas asked me I could not swear to—as to the Paris green—that I saw it myself.

X Q. 30. I repeat my question and ask for an answer.

Ans. I did after I was asked that question by Mr. Thomas, and found I could not testify to any hearsay.

X Q. 31. Is your answer to direct question 9 true as within your knowledge?

Ans. No, sir; I never saw the Paris green.

X Q. 32. When was this conversation with Mr. Leonard, of which you attempted to testify?

Ans. I could not tell the month or day, but it was while he was shipping the cattle out of Concord.

X Q. 33. Was any one present; and, if so, whom?

Ans. I could not say there was.

X Q. 34. Did you make any memorandum of it?

Ans. No, sir.

X Q. 35. Are you willing to swear that you remember after this lapse of time the conversation?

Ans. I am willing to swear to what I testified in regard to the conversation.

633 X Q. 36. To whom have you spoken in regard to this conversation previous to your giving your deposition to-day?

Ans. I can't remember any one except C. L. Hartwell in particular. There was a good deal of talk about these cattle being poisoned up there. There was a young man up there. I don't know but it was Mr. Shepard. I can't say I recollect what any of our conversation was; but while I was there sick he called upon me and asked me some questions, which I answered.

X Q. 37. Is not the young man whom you call Shepard present at the taking of this deposition?

Ans. He is.

X Q. 38. State the conversation you had with Mr. Leonard in the words that were used at the time of said alleged conversation.

Ans. I don't think I can quote the exact words. The substance of the conversation was he was afraid of more trouble from the effects of the poison.

Plaintiffs' counsel objects to last clause of answer as not responsive.

Examination closed.

ALONZO TOWER.

Subscribed and sworn to by the above-named Alonzo Tower, at Boston aforesaid, this 24th day of September, A. D. 1884, before me—

C. P. SAMPSON,
Notary Public.

[L. S.]

634 *A. W. Hosmer.*

Deposition of Alfred W. Hosmer, a witness on the part and behalf of the defendant, taken before Calvin P. Sampson, a notary public within and for the county of Suffolk, in the State of Massachusetts, at his office, in Boston.

BOSTON, *September 30th*, 1884.

ALFRED W. HOSMER, a witness called on the part of the defendant, being first duly sworn, deposes and says:

Q. 1. What is your name, what your age, where do you reside, and what is your occupation?

Ans. Alfred W. Hosmer; age, thirty-three years; Concord, Massachusetts; my occupation is clerk in the post office at Concord.

Q. 2. Whether or not you know the farm at Concord that was owned last year by Tower & Clark, and by what name is the farm known.

Ans. It is called the Brown farm. I know the farm.

Q. 3. Whether or not you saw a large lot of cattle on this farm in August, 1883.

Objected to.

Ans. Yes, sir; I did.

Q. 4. Whether or not you found any Paris green on the farm, and when and where did you find it.

Objected to.

Ans. Yes; I found Paris green on the farm on the morning of August 26th, I think was the date. It was Sunday morning, at any rate. It was about a half a mile down the field, back of the
635 barn. The package laid in between a stone and a stump, and was perhaps four inches square and an inch thick, I should say, from appearances. I don't know the quantity, whether a half or a whole pound. I did not wait to see it moved. It was lying decidely exposed. I did not handle it at all. The package was broken open.

So much of answer objected to as not responsive to question.

Q. 5. Whether or not was the Paris green in the same field with the cattle?

Objected to as leading.

Ans. It was.

Q. 6. Can you tell about how many cattle were in the field; if so, about how many?

Ans. No; I can't tell how many. I should judge there must have been somewhere in the neighborhood of seventy-five. It may have been more or may have been less.

Q. 7. Did you at any time discover any Paris green upon the cattle; and, if so, upon what part?

Ans. I did. After seeing the Paris green lying there, I saw it upon the noses of some of them; just how many I could not say. They showed it on their noses, and some of them showed little touches of it on their sides, as though they had twisted their heads and left it there.

Q. 8. Did you see any of these cows or heifers sick after this, or before you saw the Paris green?

Objected to as assuming a fact not proved.

636 Ans. Not of my own knowledge; only what the men spoke of being sick. As we went by the back of the barn we saw one of the heifers lying dead; a three-year-old they called it.

Objected to so much of last answer as is hearsay.

Q. 9. What was the color of the cattle; whose cattle were they?

Ans. The color was principally black. There were some few of them which had some white on them. They were hornless cattle, and were said to belong to Leonard and Estell.

Last part of this answer objected to.

Q. 10. Describe the place, as nearly as you can, where you found the Paris green; what was done with it?

Objected to as already testified to.

Ans. It was about half a mile back of the barn, near a cart path which ran through the low land, a ditch being at the right side of the path. The Paris green lay at the left of the path, in what looked to be the remains of an old wall. The stone and the stump were both rather weather-beaten. I mean by this stump the stump of a bush, not of a tree—the stump of an alder or birch, not a very large one. It laid up from four to six inches above the surrounding land.

Q. 11. Whether or not there were any marks of the cattle having had access to it?

Objected to as decidedly leading.

Ans. It showed that it had been broken into, and the stone
637 that this Paris green was lying against showed the same marks, as though the noses of the cattle had been dipped in the Paris green and then rubbed on the stones. The stone was of light color, so that it showed very plainly.

Direct examination closed.

Cross-Ex.

Cross-examination by Mr. PIERCE:

X Q. 12. How long have you been a clerk in the post office?

Ans. Since 1875; nine years and a half.

X Q. 13. What is your duty there?

Ans. It is helping in distributing the mail, taking care of the office; and there is also a fancy-goods store in connection, and I am clerk in that.

X Q. 14. What are the fancy goods?

Ans. We keep a general country fancy-goods store—stationery, books, confectionery, paper hangings, and toys.

X Q. 15. Who owns the store?

Ans. H. L. Whitcomb.

X Q. 16. Previous to your employment in the post office what was your business?

Ans. Carpentering.

X Q. 17. How long had you been a carpenter?

Ans. I had been, perhaps, four years.

X Q. 18. Are you married; if so, do you rent a house in Concord?

Ans. I am not married; I do not rent a house there.

X Q. 19. You have not engaged in farming or planting during this time, have you?

Ans. No, sir.

X Q. 20. Have you had any experience or knowledge of mineral poisons?

Ans. No, sir; I have not; not — my own personal knowledge.

638 X Q. 21. Was any one with you when you found something to which you have given a name, that Sunday?

Ans. There was.

X Q. 22. Who, and where does he or they live?

Ans. My brother, Herbert W. Hosmer; he lives in Concord, Mass.; there were also five or six of the men who were taking care of the cattle; the only one whose name I know was Mr. Cunningham.

X Q. 23. Whose men were these?

Ans. They were at work for Leonard and Estell, and had charge of the cattle there.

X Q. 24. Do you know whether they lived in Concord?

Ans. They were not residents of Concord; they were only there just the length of time the cattle were.

X Q. 25. Do you know whether they went with the cattle west?

Ans. I think they did.

Examination closed.

ALFRED W. HOSMER.

Subscribed & sworn to by said Alfred W. Hosmer this 29th day of September, A. D. 1884, before me—

C. P. SAMPSON,

[L. S.] *Notary Public.*

Chas. Harrington.

Deposition of Charles Harrington, a witness on the part and behalf of the defendant, taken before Calvin P. Sampson, a notary public within and for the county of Suffolk, in the State of Massachusetts, at his office, in Boston.

BOSTON, *October 9th*, 1884.

639 Q. 1. What is your name, what is your profession, and where is your office or place of business?

Ans. Charles Harrington. I am a physician and an assistant in chemistry in the Harward medical college. My office is at the Harward medical college, on Boylston street, in Boston.

Q. 2. Have you made chemistry a study, and when did you commence to study that science, and where?

Ans. I had studied it previously to going to college. I couldn't say in just what year. It was while I was at the high school. My first real study of it was in college, in 1874, and, after graduating from college, in 1878, I studied it in the medical college. After graduating there, in 1881, I studied it in Leipsic, Strasburg, and Munich. Since that time I have made a specialty of medical chemistry and hygiene.

Q. 3. Whether or not are you now connected with any institution in the pursuit of your studies and practice; if so, with what institution, and how long have you been so connected?

Ans. I am assistant in chemistry at the Harward medical college, and am now entering on my second year of service.

Q. 4. Whether or not are you now daily occupied in the pursuit of that study?

Ans. Yes.

Q. 5. Whether or not are you often, and how frequently, called to testify as an expert in cases involving inquiry into matters of chemistry?

640 Ans. I am often called. How often I can hardly say.

Q. 6. About how many times in the last year?

Ans. Sometimes I have a number of cases in one day. I should think I had been in on thirty-five cases this year.

Q. 7. Whether or not did you see the stomach or part of the stomach, with its contents, removed from the body of a cow at Concord on September 27th last?

Ans. On September 27th I saw a large amount of the contents of the stomach and the tissue which I took to be a part of the stomach and was so represented to me by the veterinary surgeon. It was from a cow. I could not swear it was a cow, though. It was a cow or a bull.

Q. 8. Who was then and there present? What was the color of the animal?

Ans. The persons present were Mr. James M. Shepard, a veterinary surgeon whose name I have forgotten, a third person, whose name I don't know, and a farm hand, who did most of the work of

exhumation. The color of the animal was black—what I saw of the hair.

Q. 9. Describe the place where you saw the body.

Ans. It was in a large open field, and the cow was buried in a sort of sand bank. I don't know that I can describe the place any more accurately.

Q. 10. Who opened the body and from what place was it taken up?

Ans. It was opened by the veterinary surgeon. The cow
641 was not lifted up from the hole. The sand was moved from above and around the cow, which was left *in statu*. Then the opening was made by the veterinary.

Q. 11. Did you subject the stomach or its contents to any and what examination, and what was the result of the examination?

Ans. I subjected a part of the contents and a part of the tissue to examination and discovered a considerable amount of arsenic and of copper.

Q. 12. Did you take away a part of the stomach and its contents, and to what place were they taken by you, and what did you do with them?

Ans. I took a portion of the contents of the stomach and a portion of the tissue itself in two large jars, which were sealed. I carried them that night to my house in Longwood and removed them on the following day to the medical college on Boylston street, Boston. On the 29th of September I began the chemical examination of part of the contents and tissue and completed my examination on Monday, October 6th, of this week.

Q. 13. Will you please state the result of your analyses?

Ans. I detected a considerable amount of copper and of arsenic.

Q. 14. Whether or not was what you found poisonous?

Ans. It was.

Q. 15. Whether or not was it what is sometimes called Paris green?

Objected to.

Ans. The occurrence of both of these substances would lead me to suppose that originally they were in the form of Paris
642 green, though it is possible that each poison could have been ingested separately.

Q. 16. Will you please tell us what is Paris green, if such a thing is known to chemists?

Ans. The arsenite of copper.

Q. 17. Have you with you here the material result of your examination, and will you explain it so that the magistrate may take down your explanation?

Ans. I have here in this large watch-glass a green deposit of nitrate of copper, and in this glass tube this dark mirror of arsenic. These are the material results of the examination.

Q. 18. Whether or not was what you discovered sufficient to cause the death of the animal?

Objected to unless witness is qualified as an expert.

Ans. The amount of these substances which I isolated would be but a fair indication of the amount in the stomach, which amount would seem to me to be more than sufficient to cause death.

Q. 19. I notice in the deposition in this case by a young veterinary a description of Paris green as "arsenicate of copper." Do you, as a chemist, know any such thing?

Ans. Not under that name.

Direct examination closed.

Cross-Ex.

Cross-examination by Mr. BURKE, of counsel for plaintiffs:

X Q. 20. Have you ever been in active, independent practice as a physician or chemist?

643 Ans. I have never practised medicine except to a slight extent three years ago. For the past year and nine months I have been in active practice as a chemist.

X Q. 21. During this last year and nine months have you been in active independent practice as a chemist?

Ans. Yes, sir.

X Q. 22. What were the natures of the cases you have been called upon as an expert during this last year?

Ans. I have been called as expert into court by the State board of health, lunacy, and charity on the adulteration of foods. All the cases during the past year in court had reference to adulterations of food. I have been engaged in cases of poisoning which did not come into court.

Last part of answer objected to as not responsive.

X Q. 23. From what part of the body of that cow was this tissue, &c., taken—that is, from what stomach of the animal?

Ans. It was represented to me as being the paunch.

X Q. 24. Did you examine to see personally where it came from?

Ans. As well as I could.

X Q. 25. What examination did you make, if any, for that purpose?

Ans. I looked into the opening, saw the tissue and the contents of the stomach.

X Q. 26. Then your main knowledge on this point comes from what was reported to you by the veterinary surgeon?

Ans. As to this point of the paunch, yes.

644 X Q. 27. At whose request were you present at that time and place?

Ans. At the request of Mr. James M. Shepard.

X Q. 28. The Mr. Shepard that is present here?

Ans. Yes, sir.

X Q. 29. Had you previously experimented as to the effect of arsenic or copper upon cattle?

Ans. No, sir.

Cross-examination closed.

Redirect.

Redirect question by Mr. THOMAS:

R. D. Q. 30. I suppose chemistry is, so far as you know, an eternal study, is it not?

Ans. Yes, sir.

Examination closed.

CHARLES HARRINGTON, M. D.

Subscribed and sworn to by the said Charles Harrington this ninth day of October, A. D. 1884, before me—

[L. S.] C. P. SAMPSON,
Notary Public.

E. F. Thayer.

Deposition of E. F. Thayer, a witness on the part and behalf of the plaintiffs, taken before Clinton J. Edgerly, a justice of the peace, in Boston, Suffolk county, State of Massachusetts, at the office of Edward H. Pierce.

Deposition of E. F. Thayer in answer to the interrogatories proposed by Edward H. Pierce, counsel for the plaintiffs, and cross-interrogatories by T. G. Thomas, counsel for defendant.

Int. 1. What is your name, age, residence, and occupation?

Ans. Elisha F. Thayer; age, sixty-eight; occupation, veterinary surgeon.

645 Int. 2. How long have you been a veterinary surgeon?

Ans. Something over forty years.

Int. 3. Do you hold any position under the United States Gov't; if so, what?

Ans. I do not to-day.

Int. 4. Have you held any position under the United States Government; and, if so, when were you appointed, what was the position, and when did you resign?

Ans. I held the position of member of the U. S. Treasury cattle commission. I was appointed, I think, July, 1881; it was when the commission was established. I did not resign at all; it was turned over to the Bureau of Agriculture; consequently the commission expired.

Int. 5. What were your duties while a member of this commission?

Ans. As a body, our first duty was to select suitable sites for quarantine stations for imported cattle. My first duty—I was sent to Nova Scotia to investigate a supposed contagious disease for the United States cattle commission. I had, as commissioner, a kind of supervision over the quarantine cattle station at Waltham, Mass., and Portland, Maine, and, being a veterinary surgeon by profession, I also for a time performed the duties of veterinary inspector at both stations.

Int. 6. What is the distance from your residence at West Newton to the station at Waltham, Mass.?

Ans. About three miles and a half, I judge.

Int. 7. When was the cattle commission of the Treasury Department turned over to the Agricultural Department?

646 Ans. It was not turned over at all.

Int. 8. When did you cease to act as commissioner?

Ans. I cannot answer definitely for this reason: I didn't receive a notice of the discontinuance until about July 10, 1884, but I had performed four days' service in the month of July.

Int. 9. Do you remember inspecting a lot of Scottish cattle imported by the plaintiffs in this action and quarantined at said Waltham in July, 1883?

Ans. I do.

Int. 10. How long were they at quarantine at Waltham?

Ans. They arrived on evening of July 12, 1883. They were removed to Concord about August 1st or 2d. That I do not know positively, as I was not in the State.

Int. 11. What was the breed and what was the number and condition of cattle when they arrived?

Ans. The breed was called Galloway and Angus. I believe Leonard Bros. had three hundred and fifteen and Eliot and Estill sixty-seven. They appeared to be healthy.

Int. 12. How frequently did you see said cattle while in quarantine at Waltham?

Ans. Sometimes daily, sometimes not as often.

Int. 13. What was their general condition during the time they were at said quarantine?

Ans. After the first five days they were healthy, as far as could be discovered.

Int. 14. Do you except the first five days on account of the sea voyage?

647 Objected to by Mr. Thomas, counsel for defendant.
Question withdrawn by Mr. Pierce, counsel for plaintiff.

Int. 15. Why do you except the first five days?

Ans. Because they suffered from heat.

Int. 16. Do you remember when the cattle left Concord?

Ans. I date when they probably left; I think it was; I don't positively know.

Int. 17. Previous to their leaving Concord did you inspect the cattle; and, if so, what was their condition?

Ans. With Dr. Rose I inspected the cattle Aug. 27, 1883. So far as could be determined, they appeared to be healthy. That isn't correct; the date was Sept. 11, 1883.

Cross-Int.

Cross-interrogatories by Mr. THOMAS, counsel for the defendant:

Int. 1. Did you have any communication from Leonard, plaintiff, about the time when you first saw these cattle?

Ans. I don't recollect anything particular. I met him aboard ship. That was the first time I saw him.

Int. 2. Did you ever have a telegram from him that there were fifty cattle & afterwards that there were three hundred and eighty-two?

(Objected to by Mr. Pierce, counsel for pl'ff-, on the ground that if any dispatch it should be produced before contents testified to.)

Ans. I received the cable dispatch, dated Paris, — 16, in which it was stated forty-five cattle would arrive, I think it stated, 11
648 or 12 of July. I received a dispatch from Missouri on the evening of fourth of July that *they* would be four hundred.

Int. 3. Who was that last dispatch from, and where is it?

Ans. 3. It is at my house. I forget whether it is signed I. Leonard or Leonard Bros. I remark on the following day I received notice at the custom-house, on the 5th, that 382 would arrive in the Virginia.

Int. 4. Will you produce these dispatches and the notice, that they may be annexed to your deposition?

Ans. 4. I will if it is proper. I don't like to part with them, however, as I expect that I may want them in another case. I will produce certified copies.

Int. 5. When did you first see Leonard, and where?

Ans. 5. As far as I can remember, on arrival of ship and on board of ship that I first saw him.

Int. 6. Do you remember the day of the month?

Ans. 6. I think it was twelfth of July.

Int. 7. Did you go to the deck where the cattle were?

Ans. 7. They were in the hold. I went there. I may be mistaken; it is what I call the hold.

Int. 8. Was it not excessively hot there?

Ans. 8. It was.

Int. 9. How many cattle were there in that hold?

Ans. 9. Three hundred and eighty-two. I did not count them, but that is the report of the manifest.

649 Int. 10. Did any of them die before they arrived at Waltham?

Ans. 10. It was said that one died on the cars. It was reported so to me by assistant superintendent.

Int. 11. Were these cattle all cows?

Ans. 11. They were not all. I cannot give the numbers.

Int. 12. Any bulls?

Ans. 12. There were; how many I don't know.

Int. 13. Any oxen?

Ans. 13. There was one steer, as they called it, I believe—one bullock.

Int. 14. When did they arrive at Waltham?

Ans. 14. I can only give hearsay, as I wasn't present; my assistant went out with them; I never did.

Int. 15. Who was your assistant that went out with them, as you say?

Ans. —. George B. Harrington.

Int. 16. Where does he live?

Ans. 16. He is dead.

Int 17. When did you first see them at Waltham?

Ans. 17. I think the next day; my minutes state the fifteenth of July, but I think I did go the fourteenth, as I went to Concord that day, and I went from there, I think.

Int. 18. Don't you know they were a long time on the cars to Waltham?

Ans. 18. I only know from what they tell me.

Int. 19. Who tells you?

Ans. 19. Mr. Leonard for one and Mr. Harrington for another.

Int. 20. Were they not much crowded in the cars on their way to Waltham?

Ans. 20. I wasn't present; consequently I cannot answer from my own knowledge.

Int. 21. Had you sufficient shed-room for them at Waltham?

650 Ans. 21. No; we had not at the time of their arrival.

Int. 22. Were not some of them sick at Waltham?

Ans. 22. There were two sick,

Int. 23. Did any of them die there?

Ans. 23. Both died; one I saw and made a post-mortem examination; the other I didn't see; it was removed before my arrival.

Int. 24. Were these cattle removed to Concord?

Ans. 24. I understand they were.

Int. 25. When?

Ans. 25. I cannot positively answer. I should say Aug. 1st or 2d. I was absent from the State at the time.

Int. 26. How were they removed—by car or over the highway?

Ans. 26. Over the highway, I was informed.

Int. 27. Why were they removed from Waltham to Concord?

(Objected to by Mr. Pierce, so far as he calls for information for which he had no personal knowledge.)

Ans. 27. It was stated for insufficient accommodations.

Int. 28. When did you first see them at Concord?

Ans. 28. My minutes say Aug. 11th.

Int. 29. Who was present with you?

Ans. 29. I think both collectors—Collector- Worthington and Fisk.

Int. 30. Did you ever see either of the Leonards or Estill or Elliot there?

Ans. 30. I don't know. I don't recall. I think I did, but I can't say positively.

Int. 31. Did you see them or either of them at Waltham, and which of them?

Ans. 31. Really I don't remember; I met them all at the
651 custom-house. Whether I met them there or not I don't know. I think I did, of course, but which one I don't know. I am quite sure I met either Elliot or Estill at Concord; which one I don't know. I couldn't tell them apart if I should see them now.

Int. 32. How far is it over the highway from Waltham to Concord?

Ans. 32. To this farm about fourteen miles. I am not much acquainted with the roads. It may not be over twelve and a half; two miles and a half from the village; that is the amount of it.

Int. 33. On whose farm or at whose place were they at Concord?

Ans. 33. Mr. Tower held a lease of it, I believe.

Int. 34. How long did they remain there?

Ans. 34. That is a question. I suppose they went away; I have forgotten. I made the inspection and I suppose they went away the next day.

Int. 35. Were not some of them sick there?

Ans. 35. They were.

Int. 36. Did not some of them die there?

(Objected to by Mr. Pierce unless witness was answering from his personal knowledge.)

Ans. 36. It was said so. I didn't see a dead one there.

Int. 37. Is it not true that these cattle had access to Paris green and were sick and some of them died from it?

(Objected to by Mr. Pierce; plaintiff objects as to witness testifying to any injury not within his personal knowledge.)

652 Ans. 37. I saw Paris green. I saw some sick cattle and was informed that so many had died.

(Last part objected to by Mr. Pierce as incompetent, the witness having been warned that he could not testify as to anything not within his personal knowledge.)

Int. 38. Who so informed you?

Ans. 38. I can't tell exactly who. I first saw notice in Daily Advertiser and went there to see if true.

(Objected — by Mr. Pierce as incompetent and not at all responsive to the question.)

Int. 39. When you went there, as you say, to see if what you heard was true what did you learn about it?

(Objected to by Mr. Pierce on the ground that it was incompetent for the witness to testify as to what some person other than the plaintiff told him.)

Ans. 39. I was driven to yard connected with the barn from the depot; in that yard I found five or six animals sick—I think it was six—which I was told had suffered——

(Objected to by Mr. Pierce on the ground of telling anything that

was told to him, the same being hearsay and incompetent and improper for the witness to state.)

—and the man who attended them said to me——

(Objected to by Mr. Pierce.)

—that they suffered from eating Paris green.

(Plaintiffs' counsel moved to strike out all of this answer which is hearsay evidence and improper for the witness to have given.)

Int. 40. About how long was the visit you have just spoken of in your last answer before the cattle left Concord?

653 Ans. 40. This, according to my minutes, was the twenty-seventh of August, and they went away the eleventh or twelfth, I think, of September—that is, I inspected them and I suppose they went the next day.

Int. 41. Did any of these six cattle die before they were taken away?

Ans. 41. Not to my knowledge.

Int. 42. Where did you see these papers of Paris green?

(Objected to, as nothing has been said about papers of Paris green.)

Ans. 42. I saw Paris green, I think I saw some at or upon some stones where they said it was found, and there I saw some shreds of paper which were supposed to have held Paris green.

(Objected to by Mr. Pierce; that part of the answer which relates to hearsay testimony.)

Int. 43. Whether or not was this Paris green near where the cattle drank.

Ans. 43. It was.

Int. 44. What is the technical term used by chemists for Paris green?

Ans. 44. Arsenic of copper.

Int. 45. Is that poison?

Ans. 45. Said to be.

Int. 46. What symptoms did these six sick cattle show?

Ans. 46. Five of them merely showed a dullness and hair didn't lay smooth; that is about all for those five; the sixth was quite sick; the temperature was about 105; she was exceedingly dull, drooped, apparently quite sick.

Int. 47. Whether or not were their symptoms such as you would naturally expect in a case of poisoning.

Ans. 47. Yes; they were a mild form of poisoning, I should say, yes, at that stage you might say yes.

Int. 48. Were these six cattle cows?

654 Ans. 48. I think they all were cows or heifers; I don't positively know because I did not make a minute of it at the time.

Int. 49. Suppose them to be with calf, would not this poison be an adequate cause for abortion?

(Objected to by Mr. Pierce, it not appearing that the witness is qualified to testify on that point.)

Ans. 49. Taking Paris green is sufficient to produce abortion if enough is taken.

Int. 50. Suppose these cows to have taken Paris green when drinking, would it not naturally produce the symptoms you saw?

Ans. 50. Yes; if they drank Paris green with the water.

Int. 51. What would be the effect of taking Paris green upon the fœtus?

Int. 51. Through the circulation of the blood produce death if sufficient quantity was taken.

Int. 52. Might not some considerable time elapse before abortion would follow?

Ans. 52. Naturally.

Int. 53. Do you regard abortion contagious?

Ans. 53. I think so; I don't consider, thou-, that the question is fully settled.

Int. 54. Are you familiar with the writings of the late Mr. Youath?

Ans. 54. Somewhat.

Int. 55. Did you not regard him as a man of very rare ability and a veterinary of the first authority?

Ans. 55. I always have.

Int. 56. Do you not know that he gave as the symptoms of poisoning a rough or staring coat, the skin clinging to the ribs, and loss of appetite?

Ans. 56. I think he does, without doubt.

655 Int. 57. Were there any premature births from these cows at Concord?

Ans. 57. Not to my knowledge.

Int. 58. Suppose a collision by cars in which cows are loaded, would that be likely to produce abortion unless fœtus was injured by some blow?

Ans. 58. I should say if the uterus was severely injured it might produce an abortion independent of fœtus being injured.

Int. 59. But not unless one or the other were injured, I infer?

Ans. 59. Well, that is a hard question to say exactly. I should say unless the uterus or its adjacent tissues—of course that includes the fœtus—were injured abortion wouldn't necessarily take place.

Int. 60. Suppose a cow in a herd to have aborted, is it not necessary, in your judgment, to separate that cow very soon after the abortion from the others?

Ans. 60. Most assuredly.

Int. 61. What is the effect of the abortion of one cow upon the other cows with calf in the same herd? State fully.

Ans. 61. I can only answer that by reporting medical authorities and cattle-owners——

(Objected to by Mr. Pierce as to the further answer to this question.)

It is believed by them that it is contagious, and, consequently if one aborts others will.

Int. 62. Are not cows with calf quite sensitive to smells?

Ans. 62. They are said to be. I think they are myself, by the way, by what I have seen personally.

Int. 63. Is it not true within your own experience that
656 when one cow of a herd aborts it is necessary to destroy the fœtus and particularly the placenta at once?

Ans. 63. Personally I have not had much experience with that.

Int. 64. Do you not know that there is a habit among some cows to abort?

Ans. 64. So reported. That is all I can say of that.

Int. 65. In case of abortion caused by blows upon the fœtus or other violence is not the effect more immediate then from other causes?

Ans. 65. I should say yes.

Int. 66. Is it not the custom with successful and experienced cattle-breeders to separate a cow that aborts from the balance of the herd immediately after it occurs?

Ans. 66. I can only answer and say that some do it; how general it is I don't know.

Int. 67. If called upon as a veterinary should you not so advise?

Ans. 67. Certainly.

Re-Ex.

Re-examination by Mr. PIERCE on Saturday, Sept. 27th, at 9½ a. m.:

Int. 1. What accommodations had you prepared for the cattle at the Waltham quarantine when they arrived?

(Objected to by defendant.)

Ans. 1. We had two buildings. They were both forty —. Each one of them was hardly finished, yet we put it to immediate use, so we considered it built; with the yards attached, fenced, containing about one and one-half acres of ground each.

Int. 2. When did they arrive?

(Objected to by Mr. Thomas, for def't.)

Ans. 2. They arrived—I wasn't present at their arrival at Waltham.

657 Int. 3. When did you first see them at Waltham quarantine?

(Objected to by defendant.)

Ans. 3. I am unable to state whether 13th or 14th; perhaps I can tell.

Int. 4. Did you have other sheds prepared for said cattle; and, if so, what, and when were they ready?

(Objected to by defendant.)

Ans. 4. The other building, erected three hundred feet in length by twenty-four in width, connected with a yard with a grove of trees. The cattle were admitted into that shed on the morning of the eighteenth of July.

Int. 5. What was the cause of the death of the one that died at Waltham, in which case you say you made a post-mortem examination?

(Objected to by defendant.)

Ans. 5. In my opinion the death was caused by heat—excessive heat.

Int. 6. Do you know that any other of these animals died there?

(Objected to by defendant.)

Ans. 6. Not of my own personal knowledge.

Int. 7. Was this one that died a cow; and, if so, was she with calf?

(Objected to by counsel for defendant.)

Ans. 7. It was not a cow; it was a heifer, and she was not in calf.

Int. 8. At the time this herd left Waltham, had they, in your opinion, recovered from the effect of the heat?

(Objected to by defendant.)

Ans. 8. Well, I can hardly offer an opinion. As far as I know I should say yes.

Int. 9. How many sick cattle did you see at Concord, and where were they?

(Objected to by the defendant.)

Ans. 9. I saw six cattle in a yard, connected with Mr. Tower's barn, I should suppose.

Int. 10. Have you any personal knowledge of the death of any of these cattle at Concord?

658 (Objected to by defendant.)

Ans. 10. No.

Int. 11. You say, in answer to cross-interrogatory 40, that you inspected the cattle on the 11th or 12th of September, and that you suppose they went the next day. Was this the official inspection you were required to make before permission could be obtained for their removal?

(Objected to by the defendant.)

Ans. 11. I suppose they went the same day, and it was the official inspection.

In-. 12. Did you, after this inspection, sign a certificate as to their condition?

(Objected to by the defendant.)

Ans. 12. I did.

Int. 13. Is the annexed a copy of it?

(Objected to by the defendant as to the interrogatory and to the introduction of certificate at this stage of deposition, and also because it is a copy and not the original.)

Ans. 13. Doesn't apply to the cow and has nothing to do with it at Boston.

Int. 14. This certificate I have reference to as given after the inspection at Concord. I repeat my question and ask if this is a copy of what you gave after the inspection at Concord.

(Objected to by the def't.)

Ans. 14. I should suppose it was. I think it is. It is not my wording, although the last part of it I recognize over my signature.

Int. 15. Do you know of your own knowledge w-ere the alleged Paris green was found?

(Objected to at this stage of inquiry.)

Ans. 15. No, of course not, of my own personal knowledge.

Int. 16. Will Paris green dissolve in water?

(Objected to by defendant.)

Ans. 16. I must answer that in the same way. I don't
659 know of my own personal knowledge.

Int. 17. Is it not insoluble?

(Objected to by defendant as leading and for other cause.)

Ans. 17. I don't know.

Int. 18. Have you any knowledge of any Paris green being in the water which these cattle drank?

(Objected to by defendant.)

Ans. 18. No.

Int. 19. Have you any personal knowledge or experience of abortion being produced by poison?

(Objected to by defendant.)

Ans. 19. No.

Int. 20. Whether or not in case of injury of a cow to its fœtus, uterus, or adjacent tissues caused by blows, jarring, or being thrown down, may a long time elapse before abortion results?

(Objected to by defendant.)

Ans. 20. I should say some time; I don't know how long.

Int. 21. Have you any personal knowledge or experience of a long time elapsing between injury and abortion in a case where the injury is due to poison?

(Objected to by the defendant.)

Ans. 21. I have no experience whatever from my own personal knowledge.

Int. 22. Previous to your giving this deposition had you been

visited by a gentleman by name of Shepherd, representing the railroad, and who has been sitting here during your examination?

(Objected to by defendant.)

Ans. 22. I was — by a gentleman who called himself Mr. Shepherd.

Int. 23. I repeat my question and ask for an answer.

(Objected to by Mr. Thomas for defendant.)

Ans. I was visited by a gentleman who introduced himself
660 as Mr. Shepherd, I think. I saw him here the other day, and I don't know who he represents from my own personal knowledge.

Int. 24. Has he been sitting here during this examination?

(Objected to by defendant.)

Ans. 24. I think I saw him here.

Int. 25. Will you look at him now and say whether he has been sitting here during this examination of to-day?

(Objected to by Mr. Thomas, counsel for defendant.)

Ans. 25. I cannot.

Int. 26. Do you mean to say you cannot say whether he has been here to-day?

(Objected to by Mr. Thomas, counsel for defendant, as leading, and, from other cause, being in the nature of cross-examination.)

Ans. 26. I do not distinctly recognize him.

Int. 27. Have you had any correspondence with Mr. Baldwin, president of the Erie railroad, in reference to this matter?

(Objected to by the defendant.)

Ans. 27. No.

Int. 28. Have you received any letter or letters from him?

(Objected to by defendant.)

Ans. 28. No.

Int. 29. Have you not said you had?

(Objected — by the defendant as leading and from other cause.)

Ans. 29. No; not as I know of. I certainly have no recollection of writing to him or of receiving letters from him at all.

E. F. THAYER.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

BOSTON, *Sept.* 27, 1884.

Subscribed & sworn to before me—

CLINTON J. EDGERLY,
Justice of the Peace.

661 *Copy Certif'te of E. F. Thayer & A. H. Rose of Inspection of the Cattle.*

Copy of certificate attached to deposition of E. F. Thayer.

WALTHAM, MASS., *Sept. 13th*, 1883.

L. Leonard, Esq.

DEAR SIR: This is to certify that, having examined your cattle at Concord Sept. 12th, '83, I found no evidence of a contagious disease having existed at any time and assuredly not at present. Therefore, on the result of such examination, I take pleasure in sending you a certificate as having a lot of very rugged and healthy cattle.

I am yours very resp't'y, ALVORD H. ROSE,
V. S., Acting Cat. Insp., Port of Boston.

Having repeatedly examined the cattle alluded to above, I hereby approve the same.

E. F. THAYER,
U. S. T. Cattle Commissioner.

Copy.

A. S. Baldwin.

A. S. BALDWIN, sworn on the part of the defendant, testified as follows:

Direct examination by Mr. POLLARD:

Q. What is your name, Mr. Baldwin?
A. Aaron S. Baldwin.
Q. Where do you reside, Mr. Baldwin?
A. Hoboken, New Jersey.
Q. How long have you resided there?
A. About 18 years.
Q. What is your present occupation?
A. Treasurer and superintendent of the New York and Western Stock Yard and Market Association.
Q. Where are they?
A. At the termination of the Erie railroad, near Hoboken.
Q. How long have you been in charge of those yards?
662 A. Ever since they were built.
Q. How many years?
A. 1881, I think.
Q. Just state what they are—whether they are a central point for the shipment of cattle—these yards.
A. They are for the purpose of receiving stock that comes over the various roads that terminate there.
Q. What roads?
A. The Erie or New York, Lake Erie & Western; the West Shore; New York, Ontaria & Western.

Q. Are there a great many cattle shipped and delivered there during the year?

A. Yes, sir.

Q. How many would you suppose?

A. I could not form any estimate. Some days as high as fifty, some as high as one hundred cars.

Q. Fifty or 100 cars a day?

A. Yes, sir.

Q. Your occupation—does the shipment and passage of those cars come under your personal observation?

A. Yes, sir.

Q. Prior to that time what was your occupation?

A. I was from 1870 to 1881 local live-stock agent of the New York, Lake Erie & Western railroad. From 1880 or 1881 to 1885 I was their general live-stock agent—of the New York, Lake Erie & Western railroad.

Q. Did that give you an experience and bring you in contact with the shipment of cattle on the road?

A. It did, sir.

Q. What other experience have you had in the cattle business—raising cattle, buying, or selling?

A. I have always been more or less connected with busi-
663 ness which brought me in contact with cattle.

Q. In what way other than the management of the road and in stock yards?

A. I was brought up on a farm; lived there till 24 years of age; my father was a dealer in live stock, and also kept a great many on his place, and raising some.

Q. Who has the place now?

A. I have the farm at present; it is my own.

Q. What kind of stock have you kept?

A. I have a farm. I have a dairy—milch cows.

Q. What kind of cows?

A. Some of the cows are thoroughbred Holstein; others are ordinary bred cows—about forty head of them. I have owned this farm since 1873.

Q. In your experience with cattle have you ever had anything to do with the abortion of cows?

A. I have had some experience in that respect; during the year 1885 I had a number of abortions in my herd; I think between March and August I had five.

Q. Are you able to state from that or from other means what produces abortion?

A. I could not speak positively what produces it or what did produce it in this case, any more than I believe it to be from high feeding.

Q. From what?

A. High feeding.

Q. Your cows were all fed?

A. Yes, sir.

Q. What did you feed them?

A. Corn meal and wheat bran generally.

Q. Is there any course of treatment or care in the conduct of aborted cows?

664 A. Well, the first precaution was always to remove them at once from the remainder of the herd; keep them separate until they entirely recovered from that difficulty.

Q. Have you ever had any cows that aborted that you knew or supposed aborted from violence or shock or accident?

A. I could not say that I had.

Q. Were you able to determine what was the cause?

A. No, sir.

Q. You have had experience in the shipment of cattle over long and short transportation, have you not, as stock agent and superintendent of the stock yards there?

A. I have had experience in receiving cattle that have come long distances.

Q. How long a distance?

A. From St. Louis to New York or Hoboken; from Chicago and points west of there also.

Q. How are those cattle shipped—in what kind of cars? and state whether they came through from Chicago without stopping for feed or water or rest.

A. Until within the recent few years, they have been shipped in ordinary stock cars; they have generally rested between New York and St. Louis or Chicago twice—once at any rate—either at Pittsburgh, Salamanca, or Buffalo; and at other times they unload twice, at Harrisburg, Pennsylvania, or Deposit, New York, or Albany, New York.

Q. When they are stoppped what is done with them?

A. They are unloaded, rested, fed, and watered.

665 Q. They are unloaded from the cars?

A. Yes, sir.

Q. They are put into lots or pastures?

A. Into pens, generally, or lots arranged for that purpose on the line of the railroad.

Q. How long are they allowed to rest at each of the stopping places?

A. Different shippers vary; some rest six hours; some a day or night, as the case might be.

Q. What is the object of that?

A. In order that they may arrive in proper condition.

Q. How long does it take to make the trip from Chicago to New York, where they make a few of those stops?

A. Until perhaps the last two years, it has generally taken four days from Chicago; four and a half or five days from St. Louis.

Q. Including stops?

A. Including stops. Recently they have come through in three days from Chicago.

Q. What is the general character of the cattle that are received or shipped at those yards?

A. A majority of the cattle that are received at those yards are for beef—for slaughtering purposes.

Q. Do you have thoroughbred cattle shipped or received there?

A. Not to a great extent.

Q. Are there some?

A. Occasionally there are.

Q. How are they treated or shipped—in the same kind of cars?

A. Yes.

Q. Common stock cars?

A. Common stock cars; yes. They are using now palace stock cars to a great extent.

Q. That is more comfortable?

A. Yes.

Q. State, from your observation and experience, the general condition in which cattle arrive—that is, how they are when they come off from that trip, say from Chicago. I suppose that is where
666 most of the cattle come from, or from St. Louis. I suppose a good many come from St. Louis?

A. Yes, sir; at certain seasons.

Q. Is there any difference in the time taken to make the run from St. Louis?

A. Generally a day longer.

Q. How are the stops on that route?

A. There are stops provided at different localities.

Q. How many between St. Louis and New York?

A. I might say feeding places in a number of points, located at Mansfield, Ohio; Cleveland, Buffalo, and Indianapolis.

Q. Now state the condition in which those cattle generally arrive on those trips.

A. The cattle generally arrive sore and, I might say, not a feeble condition, but a debilitated condition, especially if they have not unloaded and rested awhile; they cannot move about very readily and are very sore for a day or two; perhaps longer.

Q. State the character of their movements and manner after.

A. I don't know as I can say——

Q. State the general appearance.

A. They are *stiad* and sore; that explains about the whole of it. They generally lose in this distance from fifty to sixty pounds per head in weight.

Q. Are they inclined to lie down?

A. Yes, sir; after getting water and food they generally lie down immediately.

Q. Are cattle ever injured in transportation?

A. Very frequently.

Q. By reason of their own movements in the cars—own actions—by reason of their being live stock?

A. They very frequently arrive injured, and especially where they have horns; they horn each other considerably and are jammed about.

667 Q. They get down?

A. Very frequently.

Q. Do those cattle generally stand during the trip or do they lie down?

A. Mostly stand.

Q. Is there any permanent effect from that, or how long does it take them to recover from this condition you have mentioned, supposing it is simply from the effects of an ordinary trip?

A. Animals that are brought for the market or slaughtering purposes are not generally kept over a day or two; but animals that are kept, I have noticed, it takes them four days to a week to recover from being stiff and sore.

Q. To limber up?

A. To limber up.

Q. Then how are they?

A. They don't finally recover from that and get in perfect condition, perhaps, for ten days. Some cattle will stand a journey better than others.

Q. Do you know of their shipping cattle through from Chicago or St. Louis without stopping?

A. In these palace cars, I suppose that may do.

Q. Where they carry their feed?

A. Yes, sir.

Q. Were you the general live-stock agent for the Erie road at the time this accident occurred which has been spoken of in the testimony?

A. Yes, sir.

Q. Where were you at the time you first heard of it?

A. In my office at New York.

Q. State, now, when that was. You need not state what it was; state when you first received notice of it and what you did in consequence.

A. The first notice I received was on Monday, I think, the 17th of September, that an accident had occurred the day previous—

Sunday. I asked for particulars. Before I received those
668 particulars I had notice that the cattle had started west. I then immediately notified the general freight agent of the Chicago & Atlantic railroad——

Q. Where was he?

A. At Chicago. —that when the cattle arrived there that they should be unloaded and disinterested parties appointed as appraisers to inspect the cattle as to any damage that there might be to those that were sent forward.

Q. Inspected where—at Chicago?

A. At Chicago.

Q. Who was that?

A. Mr. McKay. I don't remember his initials.

Q. Go on.

A. In a few days I received notice that these gentlemen would be in Chicago for a settlement of damages.

Q. What gentlemen do you mean?

A. The owners of the cattle. At that time I don't think I knew their names. In the meantime I was advised the cattle had gone

forward to their home; that they were not unloaded and inspected according to my directions; but on receipt of this telegram that the owners would be in Chicago I went forward on the 22nd, I think it was, of September. I met them as requested.

Q. Did you arrive in Chicago and meet them?

A. I arrived in Chicago, I think, on the 24th, and met them at Mr. McKay's office.

Q. Who did you meet there?

A. Two of the Leonards, I think, and Mr. William Estill or his brother, I am not positive which; and Mr. Elliott—I don't know that he was there. I was so little acquainted with the gentlemen I could not tell who was there at that time. After a little conversation I asked them——

669 Q. I don't care about asking you as to the conversation about settlement. I don't suppose that is proper. I will ask you whether you did make a settlement there with them?

A. I did not.

Q. Why?

A. I could not do so very well without seeing the cattle at home which they said were injured.

Q. Did you state that to them?

A. I did, sir.

Q. What did you do then?

A. They finding I would not settle with them there, they left, and I went to work to secure a competent party to judge that breed of cattle and take with me to inspect and appraise the damages, if any, to them. After a day or two I found such a person.

Q. Who was he?

A. Mr. John McCulloch.

Q. Who was he or what was he?

A. He was a Scotchman, who had recently made an importation of that breed of cattle and sold them here. He was recommended to me by Col. Judy and others, who were in Chicago at that time attending the agricultural fair, the State agricultural fair being held there, as a man competent to judge those cattle.

Q. Did you know him before that time? What did you know of him then?

A. I didn't know him till I was introduced to him there.

Q. Well, you go on and state further what you did.

A. On the morning of the 26th, at about noon of the 26th, we started for Estill.

Q. Who was with you?

A. Mr. George F. Geagan, who was at that time the live-stock agent of the Chicago & Atlantic railway. We arrived at Estill on the afternoon of the 27th of September and immediately went to work and inspected that lot of cattle.

670 Q. State from the time you arrived there what you did, who you saw first, and what conversation passed between you and them; whether you told them what you came for.

A. We arrived there at half past two in the afternoon. The first one I met, I think, was Mr. William Estill. After arranging for a

place to stop, we met Mr. Elliott. I don't know what his first name is. He was present and Mr. William Estill, and I think his brother was there also; and I then asked them to show me these cattle that they claimed were damaged, or the whole lot that they had brought. They didn't do so very willingly, but did reluctantly.

Q. What did they say, if you remember?

A. They said they didn't think I had treated them very fairly.

Q. Why?

A. They thought I ought to have settled with them in Chicago.

Q. Without seeing the cattle?

A. Without seeing the cattle. About three o'clock they began to show their cattle and we inspected.

The COURT: These were the Estill & Elliott cattle?

A. Yes, sir; Estill & Elliott cattle.

(By Mr. POLLARD:)

Q. They were then on the Estill place?

A. So represented.

Q. What you understood to be the Estill place?

A. Yes, sir.

Q. How far were they from the railroad station?

A. I could not say; over a quarter of a mile.

Q. What railroad is that?

A. The Missouri, Kansas & Texas.

Q. It is no part of the New York, Lake Erie & Western road?

A. No, sir.

Q. I will ask you where—that is, what is the Western terminus of the New York, Lake Erie & Western railroad?

671 A. In coming into Chicago, that is the New York, Lake Erie & Western. The proper termination is Salamanca and Buffalo. They have leased the N. Y. P. O., which terminates at Dayton, Ohio.

Q. The line that they have control of, where is the western terminus of that?

A. I should say it is Dayton, Ohio; for Chicago it is Marion, Ohio.

Q. What road do they come over in getting to Chicago from there?

A. The terminus for transportation to Chicago is Marion; for Cincinnati, Dayton. We come from Marion Junction to Chicago.

Q. Did this New York, Lake Erie & Western own, operate, or have any control of any line running into the State of Missouri then?

A. They did not.

Q. Please go on and state what examination you made of those cattle, and what was said between you and Estills and Elliot in relation to them.

A. I stated we made an examination of the cattle; but I would say further I made a report separately by myself of what I saw of any injured or any sore or anything of the kind. Mr. McCulloch made his separately and by himself.

Q. State whether when you made the examination Estill and Elliott went round with you and showed you the cattle that they claimed were injured.

A. As to the Estill & Elliott cattle. I don't know there was more than one Elliott there. They showed us the cattle; they pointed — no cattle that were injured.

Q. You say they did or they did not?

A. They did not. I asked them to do so. They said that I was there for information; I could seek what I could find. As I said before, they didn't do it very willingly.

Q. They said you could see what you could find?

672 A. Yes, sir.

Q. Go on and state what you did find; what condition you found those cattle in; whether you saw them all and where they were.

A. I saw them all, as they showed them to me—sixty-nine head. They said it was what comprised the shipment. I thought they were in very good condition for cattle which had been transported that distance.

Q. What was there about them that was not in good condition?

A. I don't know that I can state without the report I made at the time.

Q. Did you make a report at that time—a detailed report or memorandum—showing the particular cattle?

A. I made my memorandum at the time of each lot as shown to me, and on my arrival home I made a report from that memorandum to my superior officers.

Q. Could you detail the particular injuries, if any, without looking at that memorandum, from your memory alone?

A. I could not very well.

Q. Except generally?

A. As to their condition.

Q. Was that made by you at the time?

A. The memorandums I made at the time I inspected the cattle; that statement was made from those memorandums on my arrival home.

Q. This one I have?

A. That one you have in your hand.

Q. Is this a correct copy of that?

A. Yes, sir.

Q. Did you compare them together?

A. Yes, sir; I dictated the statement; then compared it with them afterwards by reading the statement.

Q. See if that is the paper. (Paper shown.)

A. Yes, sir; this is the paper.

673 Q. You can take that paper. State in relation to the Estill cattle. (Paper handed to witness.)

A. The first lot of Estill & Elliott cattle shown me was eight bulls. I reported them all in good order and condition.

Q. Where were they—in the pasture or in the barn?

A. If I remember correctly, they were in the pasture.

Q. Go on.

A. I could notice no injury on those eight bulls. The second lot shown was forty-nine cows and calves. They were in the pasture, a short distance from the station. I reported those all in good condition; one or two somewhat stiff, but no more than would be natural after so long a journey. The third lot shown was in a small barn; three head—two bulls and one heifer. The bulls were somewhat stiff, although such stiffness was barely perceptible. The heifer had a foot in a poultice, which when removed disclosed a foul hoof, caused, as I believe, from standing is marshy or damp ground. I would say in relation to the heifer she had upon her foot which was torn a poultice.

Q. A poultice?

A. Yes, sir; made from flaxseed or something of that kind. I asked Mr. Estill, Mr. William Estill, what the trouble with that heifer was before I saw her hoof. He said she was very badly injured. I said then I must see the poultice off. He objected. I told him I could not locate the damage without I would see the hoof, and Mr. Geagan and myself removed it. That was what I found—a foul hoof.

Q. Describe that.

A. My experience is that trouble arises from cattle standing in a muddy or damp place. I often have that among my cows on my farm. I have seen them so they could not put their foot to the ground.

674 (By the COURT:)

Q. Was that two bulls and one heifer?

A. Two bulls and one heifer. This heifer had no trouble there from anything due from the collision.

(By Mr. POLLARD:)

Q. Could you tell by the appearance of it whether it was caused by a fresh wound or a recent wound or old?

A. No, sir; I just located it from my experience in early training that it was foul hoof. The fourth lot shown was eight head; five of same bulls in good condition; one a cow, which was all right; one other a cow said to have calved prematurely and one a calf badly injured; looked as though the cow had trampled upon it, and I considered it almost worthless. The one spoken of as having calved prematurely—I could see no calf there. I asked one of the gentlemen—I don't remember which—where the calf was. They said it was dead. She looked to me like a cow who had gone nearly her full time. Her bag seemed to be full of milk; didn't look like a cow that had aborted. The calf, I should say, was not more than four or five weeks old; perhaps it might have been older. That was so injured it was of no account.

Q. That is the one you say was injured?

A. Yes, sir; these bulls were examined very minutely by myself, as well as Mr. McCulloch. He made his notation separately as well as I did. The bulls were led out from the stable one by one. I saw

nothing the matter with them. The fifth lot shown was one bull in the field with some cattle raised on the farm, in good order.

(By the COURT:)

Q. This fourth lot you speak of—how many head were in that?
A. Eight head.
Q. What were they?
A. Five bulls.
Q. And three heifers?
675 A. Yes, sir; no; they were cows or heifers. The fifth lot shown was one bull, which was in the lot with some cattle raised on the farm, in good order. This covered the sixty-nine head of cattle that were shipped from Boston, so I was informed by the Estills.
Q. You didn't know how many were shipped?
A. No, sir.

(By Mr. WILLIAMS:)

Q. You didn't find anything wrong with any of them except this calf?
A. Do you wish me to read my report?
Mr. WILLIAMS: I just want to understand. Have you gone through with all of them?
A. I have—the Estills'.

(By Mr. POLLARD:)

Q. Did you find any visible injury on any of the cattle except this one that had a sore foot?
A. I did not.
Q. Any cut?
A. No, sir.
Q. Did you see the cattle move around?
A. Yes, sir. The cattle were in the field; were passed up and down by us twice, one at a time.
Q. How did they move?
A. Some of them were a little sore; nothing more than what is ordinary in the shipment of cattle.
Q. What do you mean by that—a little stiff?
A. A little stiff—footsore.
Q. They walked by?
A. Walked by rapidly enough. I saw no animal but what was feeding—eating well.
Q. How many were in the stable altogether?
A. Which lot?
Q. You said one lot was led out of the stable?
A. That was the lot containing the bulls—five bulls; the stable in which the cow was that they said had lost her calf.
Q. Those were the only cattle kept in the stable?
676 A. No, sir; there was another stable where that cow was that had a foul hoof, and perhaps there might have been another stable. I have not noted it so. I wouldn't say positively.

Q. They were led out where they could move round and where you could see them?

A. Where we could see them move about.

Q. Now, did they make any complaint of any particular cattle except this one that had a poultice on her hoof?

A. That one cow that they spoke of as having lost a calf and the calf that was badly injured.

Q. They spoke of the one they said had aborted or lost its calf?

A. Yes, sir.

Q. Did they claim that there were any others that had aborted?

A. Not at that time; no.

Q. Did you see any indication about any of the cows of abortion?

A. I did not.

Q. How long after a cow has aborted is it possible to discover any of the indications of abortion?

A. It varies. Sometimes it will be a week, two weeks, or even three weeks. My experience has been that a cow that calves prematurely does not get rid of that after-birth in the regular way. It has to rot and pass away in that form. It generally takes time to do so.

Q. Is that the principal indication that a cow has aborted?

A. No, sir. No cow will be in a thriving condition during that period; will not eat well. Sometimes she will not eat at all. Her hair will stand up. She will be gaunt and hollow.

Q. Take an ordinary case. How long would it be after the abortion before the signs will disappear so that a person could
677 not determine to a certainty whether she had aborted or not?

A. I should say six weeks, at least.

Q. You mean that would be the longest time?

A. No, sir.

Q. I am asking about the ordinary time.

A. I should think that would be about the average time.

Q. Five or six weeks. You could determine it within that time?

A. Yes, sir.

Q. How long generally is it after an abortion before the animal comes in heat again?

A. She does not generally come in heat until she gets rid of this after-birth; if she gets rid of it in a short time she will come round in regular order in about three weeks.

Q. Were the Estills with you during all this examination?

A. Yes, sir.

Q. Were any of the cows lying down that were in the pasture?

A. I don't remember that they were; I think they were all feeding when we first saw them. I want to say this: the cows in the pasture, we saw them twice; first we went to the pasture; then after examining those in the barn we came back across the pasture and saw them again; they were then feeding on ear corn. While we were absent some one about the farm had fed them their corn.

Q. Did they all appear to eat?

A. Every one of them.

Q. Did you ever see those cattle after that—any of them?

A. No; not that I am aware of.

Q. How long were you engaged in the examination of the Estill cattle?

A. From three o'clock in the afternoon to about dark.

Q. Were the cattle in different lots, in the vacinity of each other?

A. Yes, sir; very close by, not over one-fourth of a mile at the farthest.

Q. What did you do after you got through with the Estill
678 cattle?

A. I said to Mr. Estill I was not prepared at that time to make him any proposition of settlement; that I had with me Mr. McCulloch there for that purpose. I had given him full authority to appraise the damages and to be liberal in the appraisement, as these parties were large shippers of cattle; we had no desire to offend them; on the other hand, we would treat them fairly. Mr. McCulloch at that time had not made up his report. I stated to Mr. Estill or Mr. Elliott—I am not positive which—that I was going that night over to Mt. Leonard to examine the Leonard cattle, and if they would come over there the following evening after I had examined them I would be prepared then to state what I could do towards a settlement; which they promised to do.

Q. Did Mr. McCulloch and Mr. Geagan go with you and make that examination?

A. They did.

Q. Did they make a memorandum of what they saw?

A. Yes, sir.

Q. Both of them?

A. Mr. McCulloch did, of the whole examination. I made memoranda. How full Mr. Geagan made I don't know. I never saw his report in full.

Q. You may state what you did after that.

A. We left Estill in the evening at 11 o'clock; proceeded to Mt. Leonard, where we arrived the following morning at about five. After breakfast I inquired of the hotel man where the Leonards lived; he showed me, which was about a mile away, and I went there.

Q. Did the other parties go with you?

A. Yes, sir; Mr. Geagan and Mr. McCulloch went with me. We arrived there at about seven o'clock in the morning. The first one
679 I saw, as I recognize them now, was Mr. Abiel Leonard. I told him what our purpose was in coming. In fact, I told him in Chicago we would be there some time that week, or I would be there. I introduced him to Mr. McCulloch, told him for what purpose he was there; also Mr. Geagan. After while, after a conference with his brother, which I think was Leverett, he consented to show us the stock, and we went on to examine.

Q. Go on to state what you did, the cattle you examined, and what you found.

A. As I say, I made my memorandum of this lot of cattle the same as I did the other, and made my report from my memoranda in the same way.

Q. That would be about what day you were there?

A. That would be the 28th of September.

Q. About a week after the cattle arrived?

A. Yes, sir. Mr. Leonard took us about in a wagon.

Q. Which of the Leonards?

A. Part of the time Abiel and the other part of the time Leverett. The first lot shown me was thirty-five head, cows and heifers; three I report somewhat stiff, resulting, undoubtedly, from sore feet or foul hoof. These in the pasture I could not examine their feet; could not get at their feet. I judged from their appearance they had sore feet or foul hoof, three of them.

Q. Could you see what it was?

A. I could see as far as possible. I could see no perceptible injury; at any rate, there was no bruise.

Q. You mean you didn't take up their feet to examine them?

A. No, sir. Three, I say, were somewhat stiff. The remainder, so far as I could see, were in a thriving condition. The second lot was eighteen bulls; all in good condition and showing no
680 appearance of injury. I don't remember whether these bulls were in a lot or not. I think they were—the younger bulls. The third lot shown was twenty-nine cows and heifers, one a little stiff. One of the Leonards said three of the lot had *three of the lot had* given premature birth to calves. I could see no indication of it. They were heifers and looked as if they were not in calf; there were no indications of resent abortion, such as would appear on a cow that had aborted.

Q. Did you make a careful examination of them?

A. Yes, sir; I looked at them very particularly, as did Mr. McCulloch.

Q. Were they feeding? How did they appear?

A. They were all feeding. I saw no animals there in that lot, or any other except one, but what did feed. The fourth lot shown was five bulls; no appearance of injury; all in good condition. The fifth lot was forty heifers, with no appearance of injury. The sixth lot consisted of three heifers—one a two-year-old heifer, that looked as if she had calved prematurely. I could see she was not in as good condition as the others, but she had no appearance of anything passing from her which indicated a resent abortion. The two, a cow and a calf, were all right. The first was a two-year-old heifer; the other two were a cow and a calf. I don't know whether the calf belonged to the cow. I think it did. The seventh lot consisted of seventeen head—fifteen cows and heifers and two calves—all in good order, showing no appearance of injury. The 8th lot was thirty head; one cow lame in the fore foot. I have not stated whether they were cows or what they were. I think they were cows
681 and heifers. All the balance of the lot in good order, with no injury. The ninth lot was thirty-two cows and heifers; one cow stiff and claimed by one of the Leonards to have calved prematurely, but I saw no indication that such was the fact. The remainder of the lot was in good order, no injuries. The tenth lot consisted of seventeen bulls—one slightly lame in the left fore leg or hoof, the balance of the lot all right. The eleventh lot consisted

of nine head, eight bulls and one prize steer; the latter said to weigh 2,200 pounds, and in good condition. One of the bulls was a little stiff and one had a slight flesh wound, barely preceptible, on the right side; the rest were in good condition. This lot was in a stable. I would say, in reference to this, there was one of these bulls that Mr. Leonard claimed was injured in the back or loins; was not able to do service.

Q. One of the eight?

A. Yes, sir.

(By Mr. BOYD:)

Q. You mean that was one of the two injured?

A. It is in the 11th lot, consisting of eight bulls and one prize steer.

Q. You describe two; you say one was a little stiff and the other had a slight wound in the left fore leg?

A. One of the bulls was a little stiff, one had a slight flesh wound; one of these bulls, in addition to those two, Mr. Leonard claimed was injured across the loins; I could not discover it; I examined it very minutely.

(By Mr. POLLARD:)

Q. Did you feel of him?

A. I did; he seemed to be quite frisky, I thought. I told Mr. Leonard that if he had a cow that was in good condition for the male, if he didn't serve I would pay for him.

Q. Pay for the bull?

A. Yes, sir.

Q. Did you make any examination of it?

682 A. I did; felt of the hip. The bull you have reference to?

Q. Yes.

A. I felt of the loins; passed my hand across the backbone.

Q. Did it flinch when you put your hand on the hip?

A. No, it did not.

Q. How did he move?

A. He moved perfectly.

Q. He was quite fleshy?

A. Of course a fleshy animal does not move quite as sprightly as one not so fleshy.

Q. He did move about?

A. He did walk about; he was led out.

Q. Did they tell you the name of that?

A. They did not. They refused to give me the names of any there.

Q. Did you ask for the names?

A. I did ask for the pedigrees of all the animals.

Q. They refused to give them?

A. They refused to give them.

Q. So that you didn't get the names of any of the animals?

A. I did not; no way to identify them at all, except as I have

given them here. The prize steer spoken of, I said also to Mr. Leonard I thought if any animal in the lot would be injured by the shock it would be that one; he was a very fleshy, large, nice animal, and if the collision had injured the animals I certainly thought he would be injured, if any.

Q. You said that to Mr. Leonard?

A. Yes, sir.

Q. Did he make any reply?

A. He did not, only he said he was not injured. I asked for what purpose he had brought that animal. He said simply to show the product of this breed of cattle.

Q. That was black?

A. A steer.

Q. It was one of the black cattle?

A. Yes; they had imported him with the others from Scotland. The 12th lot shown was one bull in the pasture behind the
683 barn. This bull was not eating; he had a slight wound on the left hind leg and the sore or foul hoof, the hoof very much swollen. This is the bull, I take it, that they have testified to here as one that was likely to lose his hoof. I have seen animals with foul hoofs swollen as badly as that; in fact, so they could not stand on them at all. The 13th lot that was shown was sixty-three heifers on the Blackburn farm, about six miles from Leonard station.

Q. Who went there with you?

A. Mr. McCulloch and Mr. Geagen and the driver of the team.

Q. Did either of the Leonards go there with you?

A. They did not; they sent this driver with us. The lot consisted of sixty-three heifers. I reported all in fine condition except one was a little stiff. The driver said one had bunched her nose probably from the rope that tied her. That comprised the whole lot of cattle, 306 head. They claimed they had shipped from Boston except seven head left at Nankin.

Q. Did they say anything about those that had died or about any dieing at Waltham?

A. They did not.

Q. Didn't say anything about that?

A. No, sir.

Q. Did they say that was all the cattle they shipped except those that were left at Nankin or died at Nankin?

A. That is what they told me.

Q. Now, did you know anything about their having been divided amongst the Leonards? Was anything said about that?

A. I don't remember that there was. I don't say there was not.

Q. You don't know anything about it?

A. I didn't know anything about it. I supposed they were there all in partnership together.

684 Q. Who, of the Leonards, went with you to make the examination on the Leonard farm?

A. A portion of the day the one that accompanied us was Abiel Leonard.

Q. What part of the day was that?

A. The fore part, up to dinner time; then Mr. Leverett Leonard went with us. I think he was the one.

Q. Do you know where the others were?

A. Mr. William Leonard was there. That is all I saw of the Leonards.

Q. Did he go with you during the examination?

A. He was there when we examined the cattle near the house, where we didn't have to ride; I think William Leonard was.

Q. Was Charles there?

A. I don't remember seeing him.

Q. How long were you engaged in making that examination?

A. From seven o'clock in the morning or about there until evening. I think when we arrived back from Blackburn, which was the last that we examined, it was dark, when we got home, when we got back to Mt. Leonard.

Q. All but that Blackburn lot were around there in the vacinity of Mr. Leonard's house or their place?

A. Yes, sir.

Q. Did you and Mr. Leonard have any conversation about the cattle further than you have testified?

A. Not until later in the evening.

Q. After you had made the examination?

A. Yes, sir; in the evening I met them. After I had finished my examination I went to the hotel with Mr. Geagen and Mr. McCulloch, and in the evening they came down per appointment.

Q. Who came?

A. The Leonards, I think Mr. Abiel and Leverett, and also Mr. Estill, Mr. William Estill, I believe, and Mr. Elliott were there; and after Mr. McCulloch had made up his estimate of what
685 he considered the damage I made the proposition to the gentlemen as to what I could do towards settlement of the matter. I presented a proposition to them which they refused.

Q. I don't care about your stating what the propositions were on either side. What was said, if anything, by them in relation to the condition of the cattle as to abortions?

A. I don't remember anything very particular, only one instance: When Mr. McCulloch was talking with either Abiel or Leverett, I am not positive which, one of them remarked that any person who didn't know these cattle had been in a wreck would never think they had been from their appearance.

Q. How did he happen to make that remark?

The COURT: What was the last statement?

A. That any person looking at the cattle would not suppose they had ever been in a wreck.

Q. Who made that statement?

A. Either Mr. Abiel or Leverett, I am not positive which. I was not well enough acquainted at that time to distinguish the two gentlemen by name.

(By Mr. POLLARD:)

Q. In what connection was that remark made; how did he come to make it?

A. In talking with Mr. McCulloch about the damage to the cattle.

Q. Did he say in what he thought the damage consisted?

A. Yes; he claimed the principal damage consisted in abortions.

Q. In those cows that had aborted?

A. Yes, sir.

Q. In that connection he made the other remark?

A. Yes, sir.

Q. Now, were these animals that were out in the lots feeding?

A. Yes, sir.

Q. In the pasture?

686 A. I saw no animal amongst either lot, except that one bull I spoke of with Mr. Leonard, that was not feeding.

Q. If there were any of the animals lying down what did you do?

A. We drove them up; examined them.

Q. Drove them round?

A. Drove them round.

Q. You could see how they moved?

A. Yes, sir.

Q. Those in the stable, what kind of an examination did you make of those?

A. In the stable were mostly bulls; they were always led out.

Q. You had an opportunity to see how they moved?

A. Yes, sir.

Q. I suppose you didn't know then and wouldn't be able to say now what bunch of these cattle were on Abiel's or William's place or either of their places? The places were there together, were they not?

A. Yes, sir; as I understood it at that time, they were all there together. I didn't know there was any division of the land. They lived in separate houses; farther than that I knew nothing about any different farms.

Q. Or whether the cattle had been divided?

A. No, sir; didn't know nothing.

Q. State if you saw anything there in relation to the manner in which they were feeding the cattle.

A. At the Leonards'?

Q. Yes.

A. I noticed the manner of feeding in several instances. In one in particular I noticed they had—this lot was in the pasture—I noticed they had bins erected in the center of the lot or nearly there, something in the shape of a corn crib—large at the top and small at the bottom, and round the bottom was a trough. This bin was filled with what I considered to be corn meal, believed to be corn

meal; that was allowed to pass of its own will down into
687 this trough, and these cattle were allowed to go there as they chose and eat as much as they had a mind. I said to Mr. Leonard I thought it was an improper way to feed such cattle, especially cows in calf; that that alone was sufficient, in my opinion, to cause abortion.

Q. What did he say?

A. He said he had to get the cattle in condition for a sale in Kansas City in November; he had to feed them high in order to do so.

Q. Did you discover that in any of the other lots?

A. I don't remember only that one lot. I cannot say now which lot it was. I saw some other cows feeding near one of the houses on ear corn. I told Mr. Leonard also I thought they were feeding them too heavy if they were in calf, which they appeared to be.

Q. How many were there in the lot?

A. I don't remember now how many there were. I don't remember what lot it was even.

Q. Did you see the cattle after you met the Leonards at the hotel?

A. I did not. I came away that night.

Q. During all of this examination Mr. McCulloch and Mr. Geagan were with you—accompanied you?

A. Yes, sir.

Q. And assisted in the examination. In connection with these cows on the Leonard place that they claimed to have aborted, did you discover any fœtus or signs about them?

A. I did not. Mr. Leonard claimed that there were eleven then that had aborted. I asked him what had become of the fœtuses or calves. He said the hogs had eaten them up. I saw no hogs. I said to him he knew I was coming there and if he had such abortions he should certainly have shown me the proof of it. I asked him to show me the cows. He showed me only three.

688 Q. He claimed that had aborted?

A. Aborted. He showed me a fourth one which was in a condition for the bull.

Q. One he showed you had aborted?

A. Yes, sir. I told him I didn't think that cow had aborted within a few days or she would not be in that condition. He showed me no more after that.

Q. So you saw no fœtuses?

A. I did not.

Cross-Ex.

Cross-examination by Mr. WILLIAMS, for the plaintiff:

Q. You were the general live-stock agent of The New York, Lake Erie & Western Railway, the defendant, at the time of the accident?

A. I was.

(By Mr. POLLARD:)

Q. You have no connection with the Erie road now?

A. No, sir.
Q. How long since you have had?
A. Since September, 1885.

(By Mr. WILLIAMS:)

Q. You managed the stock yards at the terminus of the Erie road and other roads?
A. I am treasurer and superintendent of the company which leases them.
Q. Your business depends on the shipments of the various railroads there?
A. We endeavor to get all the stock we can in the yards, whether it be from the Erie or any other road.
Q. You were notified of the accident at Nankin the day it occurred?
A. The day following. It occurred on Sunday. I was not in my office on Sunday.
Q. You telegraphed, then, to Chicago, to Mr. McKay. Did you authorize him to act for you in Chicago?
A. I didn't telegraph Mr. McKay at that time. I telegraphed to the general freight agent of the New York, P. & O. division.
Q. Where was he?
A. At Cleveland.
Q. He was your agent at Chicago?
A. The instructions I sent McKay there were they were to be unloaded.
689 Q. Was Mr. McKay to represent you in the matter of the assessment of damages at Chicago?
A. Not at all.
Q. Were you to go there to attend to it yourself?
A. After the appraisement, so far as it was made.
Q. Who was to appoint the appraisers there?
A. Mr. McKay.
Q. He was to represent you so far as to attend to that?
A. So far as the appointing of appraisers was concerned.
Q. Was he to keep the stock in Chicago till you could go from New York there to attend to the appraisement?
A. No, sir.
Q. Was there anybody to represent your road in the matter of appointing them there?
A. Mr. McKay.
Q. That is what I say. Mr. McKay was representing your road there.
A. After the appraisement was made; no, sir. There were to be disinterested parties.
Q. Don't you know as a fact that Mr. McKay met the plaintiffs at Chicago?
A. I do not.
Q. Where is Mr. McKay?
A. I don't know. The last I knew of him he was in Chicago.
Q. He was still the agent of the railroad at that time?

A. At that time he was.
Q. The last you knew of him?
A. No, sir.
Q. He was in the city?
A. In the Central road.
Q. He is not here now?
A. No, sir.
Q. His deposition is not here?
A. Not that I know of.
Q. These gentlemen did come to Chicago to see you, didn't they?
A. They did; yes.
Q. Did they come at your request?
A. No, sir.
Q. At whose request did they come?
A. I came at their request.
Q. How did you get a request for them?
A. I am not positive whether it was Mr. McKay or who it
690 was notified me they would be there.
Q. You don't know whether they came at Mr. McKay's request or not?
A. No, sir.
Q. All you know is Mr. McKay notified you they would be there?
A. Either Mr. McKay or some one there notified me they would be there, and they would like to see me.
Q. You went there for that purpose, to meet them?
A. I did.
Q. Now, Mr. Baldwin, you say you had considerable experience in regard to the shipment of stock, principally beef cattle. How are stock shipped as to number in a car, those that are sent to New York for beef?
A. According to the wish of the shipper generally.
Q. Are they not placed in the cars, so many of them, that they cannot possibly lie down? Isn't it the purpose to prevent them from lying down?
A. Not always; no.
Q. Do I understand you to say it is not the rule to put as many in a car as they can, in order to save freight and also to prevent the cattle from getting down so that others will get on top of them?
A. Shippers differ in regard to that very materially.
Q. Is that the general rule?
A. I say the general rule is according to the shipper's——
Mr. WILLIAMS: There is no general rule.
Ans. According to his fancy. Some will load heavy, while others load lighter.
Q. Do they ship cattle from St. Louis or from the Western markets to New York for beef purposes in the same manner that they ship thoroughbred cattle?
A. I don't think they do—that is, so far as putting them in the car is concerned.

691 Q. You didn't see this shipment that was sent out from New York?

A. Which shipment?

Q. The shipment of the Leonard cattle.

A. They were not sent from New York.

Q. From Boston?

A. No, sir; I didn't see them.

Q. If the cars were bedded and the cattle arranged so they could lie down, they would be in a very different condition from an ordinary shipment of beef cattle sent to New York, would they not, when they arrived at their destination?

A. I doubt whether, if you put animals in ordinary cars and they did lie down, if they would be any better than if they had stood up.

Q. Do you say they don't treat thoroughbred cattle different from beef cattle in transportation?

A. They don't generally load as many in a car of the one class as the other.

Q. For beef purposes?

A. I say that it is done according to the shipper's fancy.

Q. I will ask you, in sending beef cattle, if it is not the customary rule that all cars should be bedded.

A. They are generally bedded.

Q. Are they different from thoroughbred?

A. They bed their cars just according to their fancy.

Q. There is no rule about that?

A. I don't think there is.

Q. Don't shippers always go prepared or generally go prepared with prods or something to keep beef cattle standing up and to prevent them from lying down?

A. I don't know that they do that to prevent them from lying down; but, if an animal is down, it is liable to be trampled on; they use the prod for the purpose of raising them up.

692 Q. Don't they go round at the stations to see they are kept up?

A. They attend to their business.

Q. That is not the way they care for thoroughbred cattle in shipment?

A. If a thoroughbred animal is down and liable to be injured, they would get her up.

Q. Isn't it the practice in this class of cattle to put them so they can lie down as well as in a stable?

A. I presume they would let an animal take its own choice.

Q. That would make a great difference as to the effect of the journey, wouldn't it?

A. What?

Q. The way in which they are taken care of in the cars.

A. I should judge if they were properly cared for they would be better for breeders.

Q. Your experience has been principally with beef cattle sent to New York; they don't ship breeders from the West very often, do they?

A. Yes, sir; they have a quarantine there at New York; they have yards in which all classes of cattle are put.

Q. They don't put cattle from the West—cattle going to New York—in quarantine, do they?

A. No; I speak of cattle going west.

Q. I am talking of cattle shipped, as a rule, to Chicago from New York; they are generally shipped by rail?

Ans. Cattle that are going west, from the other side of the water.

Q. You don't see them after they have had a journey by rail?

A. I have seen them.

Q. Where?

A. In Chicago.

Q. You don't see them in New York?

A. No, sir; not after they had taken a journey by rail.

693 Q. How long do you say these cattle require to recover from a journey?

A. I say beef cattle are generally slaughtered in a day or so.

Q. Ain't they put on the market generally immediately after their arrival?

A. Yes, sir.

Q. Do you mean to say they are generally stiff and sore and gaunt, and are put on the market in that shape?

A. They are put on the market; I don't say they are gaunt; they generally feed and water and fill them up; I say they are stiff and sore.

Q. How long, about, does it take these cattle that are transported from St. Louis and Chicago to New York before they recover from the soreness, from the effect of the journey?

A. I should say ordinarily three or four days.

Q. In that time?

A. Before they recover from soreness and stiffness; yes.

Q. I ask you would they be fully recovered?

A. They would recover from the soreness, but it would probably be a week or two before they began to thrive.

Q. You could not see the evidence of stiffness or soreness in three or four days?

A. There might be some evidence of it; in the main they should be over it.

Q. Speaking about these cattle of yours, you say you have had some experience in the matter of abortions; how do you say you feed them?

A. Feed them hay, corn meal, bran.

Q. When was it?

A. 1885 I had these abortions.

Q. That was after you had been at the Leonard place, was it?

A. I was there in 1883.

Q. You thought Mr. Leonard was about to bring about abortions by feeding his cattle corn meal?

A. I did.

Q. Then you went back to experiment with yours?

694 A. I was feeding mine for the purpose of getting milk to send to New York; in order to get that milk I was feeding them.

Q. You came to Missouri in 1883; you saw them feeding cattle corn meal; you went back and in 1885 fed your own cattle corn meal?

A. I don't say that corn meal in small quantities will injure an animal; I say in the large quantities they were giving it at Mt. Leonard.

Q. How large quantities were they giving at Mt. Leonard?

A. They were allowed to eat as much as they chose.

Q. Were they eating?

A. I saw them eating.

Q. What time of day were you there?

A. I reported here it was during the day.

Q. What time did you see them eating?

A. I think it was about the middle of the forenoon.

Q. Yet you went back home after that and began to feed your cattle?

A. I am feeding them still.

Q. What time did your cows abort, in the daytime or night?

A. I could not say.

Q. Were they with other cows?

A. They were at the time that they aborted.

Q. Did you discover the abortions?

A. I didn't discover the abortions.

Q. You didn't discover them?

A. I didn't see the abortions; I was not there.

Q. You don't know they did abort?

A. I saw the indications.

Q. What indications did you see?

A. I saw the after-birth passing from her.

Q. How long was it after?

A. Not more than two or three days in some instances.

Q. Do you know whether it was in the night-time or the daytime?

A. What, sir.

695 Q. When the abortions took place?

A. I don't know, sir.

Q. You don't know whether they were with other cattle or not?

A. My cows are always together, except after —; then they are removed from one another.

Q. How many were in the lot?

A. Forty head.

Q. Did your man keep the fœtuses that were found there for you to see?

A. No, sir.

Q. You didn't look at them? Did you instruct him to keep the fœtuses that were born?

A. I didn't say that.

Q. How long would it keep?

A. It is more than I can say.

(By Mr. WILLIAMS:)

701 Q. Mr. Baldwin, before you ever came out to examine these cattle, didn't you on the 16th—or was it before you came out—I will ask you if you didn't write the Leonard Brothers that the company wouldn't recognize or admit in any way any liability on account of any of that live stock that reached its home—destination.

A. I don't remember of such a letter.

Q. You don't remember it. When you came, Mr. Baldwin, to Mt. Leonard you say that the men there showed you the stock—allowed you to go out and examine it?

A. They went with me.

Q. You say, notwithstanding they presented this claim against the company for a large amount of damages, one of the Leonards remarked, in your presence and in that of Mr. McCulloch, that unless a man had known the cattle were in a wreck he would never judge it from their appearance?

A. Yes, sir.

Q. Which of the Leonards was that?

A. I don't say which it was, Abiel or Leverett Leonard; I said one of the two; I won't say which; as I said before, I didn't know them well enough to distinguish the two by name.

Q. You say they didn't give you anything by which you could identify the individual cattle. Wasn't every animal in the herd book and marked with a number upon its hoof and in its ear, and couldn't you identify the animals by the numbers?

A. I could not say positively that each animal was marked on the hoof and in the ear, but I think it was so.

Q. You think it was so. If that is true, you could have taken the number of the animal?

A. Yes, sir.

Q. You say these gentlemen refused to give you the pedigrees of the animals?

A. I say they did refuse.

702 Q. Didn't they tell you the pedigrees had not come, but were to be made out in Scotland and forwarded to them, and that they didn't have them?

A. I don't remember that they did.

Q. Do you remember they did not?

A. I don't remember that they did not; I remember they said they would not give us them.

Q. You don't remember the reason they gave for not giving it?

A. No, sir.

Q. Did you go to their house while you were there?

A. I did.

Q. When you first came there?

A. Yes, sir; I didn't go in at that time; I took dinner with them; they treated me very nicely.

Q. How long were you going through the Estill & Elliott lot of cattle?

A. I said that we got there at 7 o'clock.
Q. From Mt. Leonard?
A. Yes; in the morning; finished about dark.
Q. You found no evidence of any abortion in that herd at all?
A. I think I spoke of one or two.
Q. I mean they pointed out none.
A. I think I spoke in my report of one that appeared to have aborted, but not recently.
Q. You say you saw no evidence of any having aborted since the Nankin wreck?
A. I saw no recent abortion.
Q. No recent; you mean within two or three weeks?
A. I mean anything discernible.
Q. I don't understand.
A. I could see nothing that I could discern; that I could say was any recent abortion.
Q. You went through the entire lot—all the cattle?
A. Yes, sir; several lots.
Q. Did you see any bulls you thought were broken down in the loins?
A. Only that one they said had broken down.
703 Q. You didn't see any evidence?
A. I saw no evidence.
Q. In your judgment, he was not broken down?
A. No, sir.
Q. Did you see any that appeared to be internally injured?
A. I did not.
Q. See any that showed they were diseased?
A. I saw no one but what was feeding.
Q. They all seemed to be in good order and condition?
A. All seemed in thriving condition.
Q. Mr. Baldwin, you are familiar, you say, with the shipment of stock, thoroughbred stock, are you?
A. Yes, sir.
Q. Have you ever been at the great fairs of that country, where thoroughbreds are shown?
A. Yes, sir; some of them.
Q. I will ask you if you know how stock is taken to those fairs, whether by rail or otherwise.
A. By rail. I believe sometimes taken on foot when near enough.
Q. Just by rail. I will ask you if cattle when taken to fairs is not in condition at once to be taken out in the range and shown as fine stock, or does it take five or six days for them to get well, to get in condition?
A. It is all owing to the distance it is carried, the distance travelled.
Q. How far have you seen them carried?
A. I could not say that.
Q. Did you make your memorandum of damages as you walked through the cattle and noticed them?

A. Made each one separately; yes.
Q. Made them at the time?
A. At the time.

Mr. WILLIAMS: That is all.

(By Mr. POLLARD:)

Q. You have been asked about thoroughbred stock taken to fairs and the condition in which it arrived. Did you ever know of their being taken this distance without being taken from the cars?
A. I did not.
704 Q. What is the distance from Boston to Mt. Leonard or Estill, Missouri?
A. I should say about fifteen hundred miles.
Q. As a general thing, cattle taken to fairs is not taken that long a distance, is it?
A. Not as a rule, I think.
Q. Are they taken in common stock cars?
A. Not if others can be secured.

Mr. WILLIAMS: We want to read this telegram identified by Mr. Baldwin, in connection with Mr. Baldwin's testimony.
Mr. POLLARD: That refers, I see, to a letter.
Mr. WILLIAMS: The only purpose is to show who were representing the company.
Mr. POLLARD: I have no objection to your reading it. I would like to ask him a question in relation to it.
The paper was read as follows:

"Leonard Bros., Palmer house:

"Please confer with Mr. Griswold, assistant to Mr. Mackay, of — G. F. A. of Chicago & Atlantic railway, in charge. He will represent this company in adjustment your cattle damaged under any advices of this day to Mr. Mackay."

Mr. WILLIAMS: I suppose it should *me* "my advices."
Mr. BALDWIN: "My advices."
Mr. WILLIAMS: It is dated the 19th of September.

The witness, AARON S. BALDWIN, was further examined, as follows:

(By Mr. POLLARD:)

Q. I want to ask you what your advices to Mackay were.

Mr. WILLIAMS: I object to that.
Mr. POLLARD: That refers to that. We have no means of getting that letter.
705 Mr. WILLIAMS: Our only purpose was to show that Mackay and Griswold represented that company.
Mr. POLLARD: His instructions to Mackay and authority were communicated in a letter to which that refers.
The COURT: I don't see that this matter is material, anyway. I don't see that they abandoned or lost any claim they may have had

for injuries to these cattle in consequence of their not having been unloaded at Chicago and the damages there assessed; it will only have a bearing upon that, in my judgment.

Mr. COSGROVE: Mr. Baldwin said that Mr. Mackay was only authorized to have persons appointed to make the appraisement of the cattle; this is the general authority they got in the matter.

Mr. POLLARD: That is his letter to Mackay.

The COURT: There is not any plea here that they lost their right to recover damages for any injury the cattle sustained because they were not unloaded at Chicago; there is no defence of that kind here. I don't see that it is material to show whether he had authority or not.

Mr. GUITAR: It is material to *contract* the witness and show the fact this man was authorized to make this settlement which he says he was not.

The COURT: You cannot contradict the witness on an immaterial matter.

Mr. POLLARD: If it is done for that purpose, I shall object to it.

The COURT: I don't see that it is material whether he had or not, under these pleadings. If he has made a statement to the effect that he didn't have such authority, why, it being an immaterial matter, he is not subject to contradiction in relation to such statement.

Mr. GUITAR: The right of contradiction is a broad one. The question of materiality does not always go to affect the admissi-
706 bility of testimony used for that purpose, in our judgment.

The COURT: If you want to put it in to contradict him, the witness will certainly be entitled to show what that letter contained, to put himself right before the court and jury.

Mr. GUITAR: Yes.

(By Mr. POLLARD:)

Q. Will you state, Mr. Baldwin, what your instructions and authority to Mr. Mackay were in relation to the appraisement or adjustment of these cattle?

A. Mr. Mackay I gave no authority except to appoint those appraisers, and then confer with me as to any settlement of the matter.

Mr. POLLARD: That is all with Mr. Baldwin.

At this point the court adjourned until Monday morning next.

APRIL 30th, 1888.

The hearing of the cause was resumed as follows:

Counsel for defendant offered and read in evidence the deposition of John McCulloch.

Deposition of J. McCulloch.

Deposition of John McCulloch, witness on the part and behalf of the defendant, taken July 23d, 1884, before Rochester Ford, a notary public within and for the city of St. Louis, in the State of Missouri, at the office of Garland Pollard, in presence of Garland Pollard, as counsel for defendant, and J. A. Seddon, as counsel for plaintiffs.

Direct Ex.

Direct examination by GARLAND POLLARD, Esq., counsel for defendant:

Q. State your name, age, and residence.

A. John McCulloch; age, 41; residence, Glenhead House, Stranraer, Scotland.

Q. How long have you resided there?

A. All my lifetime with the exception of four or five years, the principal part of which I have travelled in America.

Q. What is your occupation?

707 A. In Scotland I was a farmer, but I came to this country as an inspector and reporter on American real estate and securities for Scotch companies.

Q. Explain what the character of that business is.

A. For a mortgage company I inspected farms and reported, and for an investment company I also inspected and reported on their investments in cities and in the country.

Q. That is, you inspected farms in America for investors in Scotland or Europe?

A. Yes, sir; for companies and also for individuals, and for American companies and individuals as well.

Q. And reported on the value of the securities?

A. Yes, sir; and also pretty largely, for the last three years, on American ranch property for companies both in England and America and for individuals.

Q. Stock ranches in what part of the country?

A. All over Texas pretty much; one in Colorado, one in Wyoming, one in the Indian Territory, one in old Mexico, and one in New Mexico.

Q. For what purpose were you inspecting these ranches?

A. Either for those who were to sell them or for those who were to buy them.

Q. Did these securities involve large amounts of money?

A. Very large amounts; some of them over two millions. I think perhaps the smallest one would be about four hundred thousand.

Q. How long have you been engaged in that particular branch of the business?

A. Since 1880.

Q. During the period since 1880 have you been engaged in any other business than inspecting these ranches?

A. Yes; I was with the mortgage and land companies of Dundee until the 1st of April, 1883.

Q. What were you doing for them?

708 A. Engaged in the general business of examining and placing mortgages on land.

Q. Since 1880, have you had anything to do with cattle?

A. A great deal. As I said before, I have inspected since then a great deal of ranch property in the West, and imported some cattle for individuals in America and on my own account.

Q. What kind of cattle did you import?

A. Polled cattle, both Angus and Galloways.

Q. How many of the polled Angus and Galloways did you import since 1880 on your own account?

A. They were all ordered except thirty-six, twenty-seven of which I sold at Kansas City and nine in Iowa.

Q. What do you mean by their being all ordered?

A. Before I went home individuals gave me orders and I sent them over for a commission.

Q. How many in all did you send over in that way since 1880?

A. About one hundred and five altogether.

Q. You say ninety of those were in 1883?

A. Yes, sir; and the others were sent over the previous year.

Q. Did you ever import any before on your own account or for others?

A. No, sir; it was all done in those two years. I have not imported any others in those two years except what I have mentioned.

Q. Had you anything to do with those polled Aberdeen and Angus and Galloway cattle prior to 1880?

A. I never had many of them in the old country, but I was born and bred up in the Galloway country and knew them just as well as if I owned them. I am a Galloway man myself, and was raised in that district.

Q. What part of Scotland is that?

A. Galloway itself is considered now to be composed of two

709 counties—Wickenshire and Kirkudbright.

Q. What is the difference between the Galloway and the Angus or Aberdeen cattle?

A. It is a matter of doubt, but my own opinion is that they are practically the same cattle, that the Galloway is the older of the two, and that the Angus has had a little drop of short-horned blood slyly introduced.

Q. Is there a recognized difference between the two?

A. Oh, yes; speaking generally, the Galloway is stronger about the head and neck, thicker in the hide, and longer in the hair; and the true Galloway never shows any horn or sign of horn, whereas in the Angus you will occasionally get a little knob, and that, to my mind, is the outcrop of the short-horn blood.

Q. Is there any difference in the value of the Angus and Galloway?

—. When you come to the fat market you may say there is absolutely no difference, and the flesh of the Galloway would frequently

be preferred, but for breeding purposes the Angus takes preference because it is a little quicker in coming to maturity.

Q. How is the market price, as a general thing, between the Galloways and the Angus?

A. For breeding purposes I should say that you may add twenty-five per cent. in favor of the Angus.

Q. What part of Scotland are the Angus and Aberdeen polled cattle in?

A. In the northeast.

Q. Are you familiar with that breen of cattle in Scotland?

A. Not nearly so much so as with the Galloways, but I am familiar enough to be able to guide myself.

Q. Have you been through that country and visited the different stock farms of Aberdeen?

A. Yes, sir; I visited some of the best of them, but the
710 buying was principally done by a friend of mine, who is a better judge.

Q. Are you acquainted with the prices of the Angus and Aberdeen polled cattle in Scotland and with the price of the Galloway cattle?

A. Yes, sir.

Q. And were you acquainted with the price of both kinds of cattle in Scotland in the years 1882 and 1883 and prior to that?

A. Yes, sir.

Q. Are you acquainted with both kinds of those cattle in this country?

A. I have seen a good many of them in this country.

Q. What proportion of those that have been imported have you seen in this country, in your estimation?

A. I saw all the importation of Matthews last year, because his and mine came together; he had about 110; I also saw a great many at the quarantine places at Quebec and Boston.

Q. Have you seen the cattle that were imported by the plaintiffs in these suits?

A. Not until I saw them at their farms.

Q. Were you acquainted with the prices of these Galloway and Aberdeen or Angus cattle in the United States in 1882, 1883, and 1884?

A. Of course I knew what it took to bring them over here, including all costs, and then I saw the prices at sales at Kansas City, Chicago, and elsewhere, and I also sold them myself, and I might consider myself as familiar with the prices as I ever could expect to be.

Q. What are the principal markets for those cattle in this country where they are sold at auction?

A. Chicago and Kansas City, the latter certainly being the place where more are sold than at any other point.

Q. Are you prepared to say that you are acquainted with
711 the market value of those kinds of cattle at Chicago and Kansas City in 1882 and 1883?

A. Yes, sir; I was taking observations.

Q. Do you think you were acquainted?

A. I think so, as well as I could ever know.

Q. Did you ever visit the farms of the plaintiffs in these suits in the fall of 1883 and inspect the cattle that are in controversy? If so, state how you happened to go there.

A. An Iowa gentleman referred Mr. A. S. Baldwin, the live-stock agent of the Erie road, to me and advised him to come in contact with me, and he requested me to accompany him to the plaintiff's farm, which I did.

Q. When?

A. The exact date I can't remember.

The witness refreshes his memory as to dates by referring to a memorandum which he says was made immediately after his visit to the farms of the plaintiffs.

The WITNESS: I visited Estill's on the 27th and the Leonards' on the 28th of September

Q. Who accompanied you?

A. Mr. Baldwin and a gentleman whose name I forgot, who was acting in a similar capacity for the Chicago & Atlantic railway as Mr. Baldwin was for the Erie. They were the only parties that accompanied me. When we got to Estill's place they met us at the railway station and were a little averse to us seeing the cattle, but ultimately allowed us to see them. We went through among the cattle and took a general inspection as far as could be made by the eye.

Q. How many cattle did you find there?

A. About sixty-nine, mostly, if not altogether, polled Angus cattle.

Q. Who were there?

A. Mr. Estill and Mr. Elliott.

712 Q. Did you tell them what cattle you wanted to see?

A. Mr. Baldwin, of course, talked to them. He told them that he wanted to see the cattle that had been injured in the collision that had taken place in Ohio on the Erie road. They went around with us and showed us the cattle. We wanted them to point distinctly to the injured ones, but they refused. They said that was for us to find out, or something to that effect, not for them to tell us. I wanted to see the pedigrees. I said that to make anything like a reasonable estimate as to the value of the cattle I wanted to see the pedigrees.

Q. Did you ask them explicitly for the pedigrees?

A. Mr. Baldwin asked them for the pedigrees, and they declined.

Q. Did you or Mr. Baldwin ask them to point out such cattle as they claimed were injured in the wreck?

A. Yes, sir; and they declined to do it and said it was for us to find out. They may casually have pointed out some, but they refused to do so in a general point of view.

Q. Did you make an examination of that lot of sixty-nine head?

A. Yes, sir.

Q. What was the result of that examination as to the character of the injuries that were visible?

A. Without taking up an individual animal, but just inspecting them by walking around through them, I found the injuries very slight, indeed.

Q. Did you at that time make a memorandum of what you discovered?

A. Yes, sir.

Q. Have you it here?

A. I gave it to Mr. Baldwin at the time.

713 Q. Can you state specifically the injuries to the particular cattle without examining that memorandum?

A. No; I never keep those things in my memory. When I put them on paper I always refer to the paper.

Q. I will show you a memorandum and ask you if that is a memorandum that you made at the time.

A. Yes, sir; I took the notes in pencil in my note book, but that is an exact reproduction made by me and is correct, as far as my judgment goes.

Q. After refreshing your memory from that memorandum, state what the specific injuries were to those cattle without putting any value upon them—simply what the character of the injuries was.

A. Out of one lot of eight bulls there was one a little stiff in moving. Out of forty-nine cows, heifers, and calves there was one cow or heifer very stiff that evidently had been hurt one way or another. Then there was one bull in the house that was stiff, and one bull outside also a little stiff, and then there was a heifer with a sore foot, and one calf almost worthless. That calf may have been hurt in the collision or it may have been trampled on. Nobody can tell how the injuries arose, but it was worthless.

Q. What was the value of that calf, supposing it was in good order?

A. I considered about $125 to be the value. You might happen to sell it for more than that and perhaps not for so much. Then there was one calf said to be lost after calving, which, of course, I could not tell about.

Q. Was there any other visible injury to that lot of cattle other than what you have named?

A. Nothing that was patent to the eye. A veterinary inspection might have revealed something else, but it was all that I could see.

714 Q. Was there any injury that might not have been reasonably considered or expected to be the result of that long transportation that those cattle had been through?

A. If I had known nothing about the collision at all I would have said that all the injuries might quite easily be due to the ordinary transport- over such a long journey.

Q. You simply state what the defects or injuries were that you saw in the cattle, no matter what the cause was?

A. Yes, sir; I didn't undertake to say what the causes were.

Q. You say, in the first place, there were eight bulls, one a little stiff. Do you mean to say that the other seven were all right?

A. Yes, sir; all right apparently—feeding and walking about.

Q. Describe a little more definitely about the one that was a little stiff.

A. He was just a little footsore and stiff in his movements, the same as cattle would get in any ordinary long journey. It was nothing apparently serious, but still it was very noticeable.

Q. Was there any visible cause or any wound?

A. No, sir; not apparent.

Q. "Forty-nine heifers and calves, one very stiff," Which was that, a calf or a heifer?

A. A heifer or a cow.

Q. The remaining forty-eight, how were they?

A. Just as you would expect them to come off of the journey.

Q. What was the character of the stiffness of this one?

A. It looked as if there was something more than footsoreness. It must have got a crush or some hurt. There was also a bull a little stiff. That one had more than an ordinary footsoreness, but it might have occurred even in an ordinary journey, for all that.

Q. You say footsoreness. Was there any physical sore?

715 A. It was stiff all over the body and a little dull, more than would have been likely with an ordinary footsoreness.

Q. You say there was one heifer footsore. Was that the same kind of a stiffness, or was there an actual visible cause?

A. She had a sore foot, a little scalded or raw, as far as I can remember, but I could hardly detail every one.

Q. Could you form any opinion as to whether it was a temporary thing or would be permanent?

A. They would all recover, in my judgment, except the heifer, which was very stiff. They were all recoverable within a little time, and all would come right, in my opinion.

Q. There was one calf that was almost worthless?

A. Yes. That, to my mind, had been trampled upon. It might have occurred in an ordinary journey and might be the result of the collision. A calf in among big cows runs big risks. The mothers may be doing their best to shield them, but even an ordinary shunting might cause them to be trampled on. The calf was worthless. What the cause was I could not say.

Q. There was one calf said to be lost after calving?

A. That is what they told me and that is the reason I put it down.

Q. With the exception of these three or four you have named, what condition was that herd in?

A. Just as you would expect them to come off an ordinary journey. They were not in very fine condition and had not been as well cared for as some cattle I had seen, but quite as you would expect them to come off a journey.

Q. At the time you visited them, how long had they been on the farm?

A. I think some eight days.

Q. They had recently arrived from Scotland?

716 A. Yes, sir; or rather from quarantine, because they were ninety days in quarantine.

Q. What, in your opinion, was the average value of that lot of cattle where they were, supposing them to be all in good order?

A. The difficulty that they put us in and kept us in was that they didn't show us the pedigrees.

Q. Assuming that they were pedigreed cattle?

A. They might be pedigreed and worth a certain price, and they might be of a different pedigree and worth very much more, but, taking my idea of them as they ran, I would say that they would cost the owners by the time they got them on their farms perhaps $260 or $270 a head.

Q. What would you assume about the pedigrees in that estimate?

A. That they were all in the herd book of pedigreed cattle and had no serious defect, such as one side being outside pedigree; that they were pure blood. They might not have a long pedigree, but yet all be inside.

Q. How do you get at that value?

A. From what I knew of the market myself, because I had bought them on the other side and brought them over here.

Q. You arrive at the value that you have put upon these cattle by taking your knowledge of the value in Scotland and adding the cost of transportation?

A. Yes, sir; adding everything to bring them to the point where they were.

Q. Taking the cost of the cattle in Scotland with all the charges up to the farm?

A. Yes, sir.

Counsel for plaintiffs object to the statement of the witness as to value as being irrelevant and immaterial.

717 Q. What, in your opinion, was the value of that lot of cattle on Estill's farm or at Kansas City, assuming that they were in good order?

A. They would have cost about $260 or $270 apiece, and they had to have something like $30 or $40 a piece profit at least to run the risk.

Q. Please put a market value on that lot of cattle, either where they were on that farm or in Kansas City, assuming that they were all in good order.

A. In the first place, I would say that nobody would market them just immediately after their arrival from a long journey. They need to be brushed up and filled up for at least a month. Then they would be valued at perhaps $320 or $330 a head, or something like that, on an average. Some would value them higher and some lower.

Q. Was there any material difference in the market price of those cattle at Chicago and in Kansas City?

A. They were selling worse in Chicago than at Kansas City.

Q. How much difference?

A. I could hardly say how they ultimately resulted. Some were being sold at Chicago, but were withdrawn and sold at Kansas City.

Q. What was the market price in Chicago at that time?

A. It was rather duller, as far as I could judge.

Q. At Estill's place there really was no market value, was there?

A. No, sir; except as they sold them at private sale.

Q. What would be a fair market price in Scotland in the summer or fall of 1883 of such a lot of cattle as those which you saw at Estill's and Elliott's?

Objected to as immaterial and irrelevant.

A. I should say about $135 apiece in Scotland, and would add about $125 apiece to bring them over. They can be brought over for less than $125.

718 Q. How long were you at Estill and Elliott's place when you made this inspection?

A. A couple of hours, I think. I just went around and saw all that could be seen by a casual inspection.

Q. Where is their place?

A. It is on the Missouri, Kansas & Texas railroad. I think there is an Estill station.

Q. Did you know either of the Estills or Mr. Elliott before that?

A. No. I had met two of the Leonards in Scotland for a minute, but the Estills I didn't know before.

Q. Did you see their cattle at any other time?

A. No; not to be able to distinguish them, at all events.

Q. Did Mr. Baldwin and the agent of the Chicago & Atlantic road go around with you through the cattle and make an inspection also?

A. Yes, sir.

Q. You have stated all the injuries to these cattle that were apparent?

A. Yes, sir.

Q. Were there any cows or heifers pointed out to you as having aborted their calves?

A. No, sir; except that there was a calf said to be lost after calving. That was all that was pointed out to me.

Q. Was it claimed that that one had aborted?

A. No; that it had died after calving.

Q. From the Estill and Elliott place where did you go?

A. The next day we went to the Leonards', which is near Mount Leonard station, on the Chicago & Alton railroad. The Messrs. Leonard were there. There were three of them. A little one, a stout one, and one with one hand wanting. I do not know them by name. There were three of them there, as I understood it.

Q. What was said and what took place there when you went there?

A. After being introduced to one who was weighing cattle, there

seemed to be a consultation between them. We waited, and
719 by and by they said they would show us the cattle; so we went around among the cattle.

Q. Did you tell them what cattle you came there to see?

A. Mr. Baldwin told them so in my presence and they said we could see them all.

Q. Did he tell them that you came to see the cattle that were in the wreck at Nankin?

A. Yes, sir.

Q. What did they say?

A. They said they would show us around, and did show us around, and pointed out all the cattle that they considered had been hurt; they made no objections.

Q. And pointed out such only as they claimed were injured in the wreck?

A. Yes, sir; but they never showed us any pedigrees.

Q. Were the pedigrees asked for?

A. Yes, sir; it was talked about; they didn't show us any. They didn't decidedly object, but they didn't have them on hand, or something. We didn't get them, at all events. They didn't actually refuse, but there were some trifling objections in a side way.

Q. Were they called for?

A. They were talked over and Mr. Baldwin evidently made a feeler to see whether they would give them pleasantly or not, and they made some little objection, enough to show that it was not wise to ask for them. I told Mr. Baldwin I could not put on a value without the pedigree. The Elliotts refused point-blank to show the pedigree.

Q. Were the pedigrees necessary in order to make any estimate of the value of the cattle or could you do that without having the pedigrees?

A. You could make an estimate, but the pedigrees would guide you very much. Your estimate would be much more reliable if you had the pedigrees.

720 Q. If those cattle were not pedigreed cattle they would be of very much less value, would not they?

A. Yes, sir; but even in the pedigree there is a vast range between the animals bred from certain stocks, and so on.

Q. So that it would be very material in ascertaining the value of the cattle to have the pedigrees?

A. Certainly.

Q. State what took place.

A. They drove us around through the cattle and we saw them all.

Q. Were they all in a body or in different lots?

A. They were in different fields, and some of them in a cattle-house.

Q. Can you state the injuries to those cattle specifically?

A. There was a large number of them, and my memory might betray me a little. There were about three hundred, principally Galloways, and a portion of them were Angus cattle; they were a

pretty well selected lot; not by any means the highest price, but nicely selected; not extra, but a nice, regular, good lot.

Q. What would you say was a fair price for those cattle per head where they were or at Kansas City, assuming them to be in good condition and recovered from the effects of that trip?

A. The estimate has to be just a little rough, because if I had been getting the value very carefully I would have selected the Angus to themselves and had seen how many males and how many females there were, and so on. My average is one for the whole lot. I should say they would cost about $250 a head landed there on the same basis that I bought such cattle myself—say $150 a head in Scotland and $100 a head for bringing them over. In the case of the Estill cattle I want to correct my estimate. I allowed $125 for bringing
721 them over, but it would be nearer right to increase the price in Scotland a little and reduce the freight to $110 per head for transportation, making a value in Scotland of $150 a head. With the larger lot of the Leonard cattle they could reduce cost of transportation to about $100 a head, because they could make something in the attendance and in the feed.

Counsel for plaintiffs objects to all the foregoing statements as to the value and price in Scotland and the cost of transportation as immaterial and irrelevant.

Q. What would be a fair market value of that lot of cattle per head in Kansas City or at the place where they were?

A. Last year, although good Galloways were costing considerably higher on the British side, they were bringing very much the same prices in Kansas City.

Q. State in dollars and cents your opinion of the market value of that lot of cattle per head, either at Mount Leonard or at Kansas City.

A. About $320 per head.

Q. How far is Mount Leonard from Kansas City?

A. Speaking roughly, about fifty or sixty miles.

Q. State, as near as you can, the specific injuries to those cattle that you discovered, without any reference to what caused the injuries.

A. I have the statement, I think.

Q. Did you make a statement at that time?

A. As soon as I got to Kansas City I made a statement from my notes in my note book, which is correct; in fact, I might say that the basis I took was what I would have considered right if I was in their places.

Q. Do you wish to look at the memorandum to refresh your memory?

A. Yes, sir.

(Witness examined the memorandum.)

In the first thirty-five heifers there were three footsore and one

very footsore; in the next twenty-nine three were said
722 to have aborted, and there was one dull-looking, which looked as if it might have been hurt. It would have been difficult for anybody to say that those said to have aborted had really done so. They didn't show sufficient signs for me to be able to say confidently that they had. In the next lot were eighteen bulls all right. Next were five bulls, one a little footsore, and one said by the Leonards not to be fit to serve, but of that I had no knowledge. Forty heifers apparently all right; two cows and one calf all right; sixteen cows and three calves all right; twenty-six cows and two calves, one cow a little lame and one a little stiff; then out of thirty-two one was very stiff; seventeen bulls, one noticeably lame; one bull in pasture with a slight wound in the thigh, and eight bulls with a slight flesh wound on one of them; then there was one steer all right; then three heifers all right, except a rope-mark on one's nose; then there was a very good Ballendallock bull, said to be not fit to serve.

Q. Were the cattle in lots on the farm as you have described them?

A. Yes, sir; in separate lots.

Q. I suppose that you have no knowledge as to the cause of the injuries that you have stated?

A. None further than that they were said to have occurred in the collision.

Q. Were the injuries such as might have occurred in the usual course of transportation of cattle on such a journey as they came over?

A. Nothing more than might have been expected, with the exception of those that I mentioned particularly. Even they might have occurred that way. There was a wound upon the thigh of one and another wound upon the flank.

Q. Was that a serious cut?

A. No, sir; a skin wound, which would heal in a week or two; in fact, nobody would object to it seriously.

723 Q. Did the Leonards point out to you such as they claimed were injured?

A. Yes, sir.

Q. Did you examine such as they pointed out?

A. Yes, sir.

Q. Were there any other injuries that you discovered that you have not mentioned in the two hundred and ninety-nine head?

A. No; I have mentioned all the injuries that were apparent in our examination; of course that examination was with the cattle loose in the field.

Q. Did you make an entry of every injury that was visible?

A. Yes, sir; everything from whatever cause.

Q. Did those cattle look unusually bad for a herd that had come from such a long journey?

A. On the contrary, they evidently had been well fed and cared for previously and landed in good condition.

Q. When you were making the examination was there anything said about the value of the cattle by the Leonards?

A. They said it would be difficult to get them in condition for a sale, but the cattle themselves by their appearance said that they were in good condition.

Q. As to showing signs of having been in a wreck, was there anything said about that?

A. One of the Leonards said that he was very anxious for me to take in contingent damages, which I could not very well do. He said, "If you don't take in the damages to follow, anybody seeing these cattle would never know they had been in a wreck." I said, "Quite true, but I cannot do so under my instructions, though I am willing to give you everything that I can which will be inside the line."

Q. What was he insisting upon as to the damage?

A. He insisted upon my putting in consequential damages to cover abortion and the like, which, of course, I could not
724 undertake. To all that he pointed out to me as having aborted I dealt with. Three were pointed out to me as having lost their calves.

Q. Were there any indications there from which you could determine whether these cows had lost their calves or not?

A. Generally speaking, I could tell by their appearance, but in this case nobody could say whether they had or not; they might or might not have done so. With heifers especially it is very hard to determine.

Q. In these that were pointed out to you, you say you could not tell?

A. No, sir; nobody could say positively either way in such an examination. A veterinary surgeon might tell by a careful examination, but not from outward appearance.

Q. Were any pointed out as having lost their calves that you thought had not?

A. Once or twice, when one was bulling, Mr. Leonard would say, "There is another one that has lost her calf;" but I said, "I think not." A cow that has lost her calf by abortion will not take a bull in eight days; that is my experience.

Q. How soon after having lost a calf by abortion would a cow be ready to take the bull?

A. I should think she would not be ready to take the bull inside of six weeks.

Q. And some heifers were pointed out to you by the Leonards as heifers that had aborted, that showed indications of a readiness for service?

A. Yes, sir. It was not positively said so; but he would say, "Now, there is another one that has lost her calf," and would point to one which was evidently bulling; but I took a different view and told him so.

Q. Did you see any calf there that they said had aborted?

A. No. He said—which was quite feasible—that the hogs fol-

lowing would have devoured the young calves, which I took as quite a good reason.

725 Q. How many were pointed out to you as having lost their calves?

A. Three were pointed out by the man to whom he referred us. That was all that they claimed then had lost their calves.

Q. In this lot of thirty-five heifers you say there were three which were footsore. Explain the nature of that.

A. That footsoreness was just what you would expect in cattle coming off a journey. Some might have a little scalding between their feet.

Q. Was that something from which they would recover?

A. Yes, sir. It would take a little off their condition for awhile, but you could easily, with care, have them all right in a month.

Q. Did you discover any visible injuries which would, in your opinion, result seriously to the herd?

A. No; the flesh wounds were just skin deep and there were none of the cattle but were able to walk and feed.

Q. How long, in your opinion, would it require to put that herd in marketable order?

A. Except those few that I have named they were all in marketable order as soon as they recovered from the journey a little.

Q. How long would it take to cure those injuries or the stiffness?

A. I should think that inside of two months nobody could tell they had been hurt.

Q. With the exception of those that you have named were they all in good order then?

A. In as good order as cattle could be expected to be in coming off a journey.

Q. Do you remember which one of the Leonards it was that made the remark you have quoted—that if a person had examined that herd without knowing they had been in a wreck he would not have supposed it?

A. I could not say from memory whether it was the thin
726 one or the stout one. Mr. Baldwin noted it at the time as being a very weak statement, coming from the owner of the cattle.

Counsel for defendant objects to the last statement as not being responsive to the question.

Q. I forgot to ask you what your occupation was prior to 1880?

A. I was a farmer in Scotland. I had an agricultural farm there of about four hundred acres.

Q. During that time did you have any experience in raising cows and calves?

A. Yes, sir.

Q. So that you consider yourself an expert in the matter of cattle?

A. I consider myself fully posted.

Q. Have you ever had any experience as regards abortion of cattle?

A. A good deal.

Q. In case of an injury to a heifer or a cow by some violence that would produce abortion how soon would the effect be produced—how soon after the violence would the animal be delivered?

A. She would be apt to abort within a very few days.

Q. Have you had any experience as regards abortion from any other cause than violence?

A. My experience has been that there are a great many causes that produce abortion. Ergot will produce abortion, and if you let the cattle out on a white frost it is apt to do so, and also if you let the cattle stand in watering places that have a steep declination, so that their bodies are inclined downwards. There are a great many causes. When once it has begun sympathy will always produce more. One is almost sure to produce others. Sympathy goes through the cows that are bearing calves.

Q. So that if a heifer or cow aborts her calf she ought to be kept from the rest of the herd?

A. Certainly. That is the dictum of almost all veterinary surgeons and the practice of people raising cattle. Whenever
727 one aborts they separate her from the rest.

Q. Please state the market value of those kinds of cattle in this country—at Kansas City or Chicago—in 1883 compared with the market value of the same kinds of cattle in 1882.

A. They were considerably lower. The average would be lower in 1883, although a good many of them would be dearer bought on the other side.

Q. What, in your opinion, was that attributable to?

A. I think last year there was a rather large importation for the market.

Q. Do you know how many were imported in each year?

A. I could not say the gross numbers.

Q. Can you tell the difference between 1882 and 1883?

A. They were lower, but I could not say exactly how much without having the figures before me.

Q. Who are the large importers of that breed of cattle in 1882 and 1883?

A. The Leonards would be the largest; in 1883 especially. Matthews imported the next largest number, I think, and Cochran and the Gerries, of Canada, and several others, whose names I forgot, imported them also.

Q. How long have those kinds of cattle been imported into the United States to any considerable extent?

A. Within the last four or five years to any considerable extent. It is practically a new thing. There were some few here before that, but nothing to speak of.

Q. You have no interest in this controversy?

A. None at all.

Cross-Ex.

Cross-examination by J. A. SEDDON, Esq., counsel for plaintiff-:

Q. What are these polled cattle?

A. Cattle without horns.

Q. You say they come principally from two sections of Scotland—one from the southwest and the other from the northeast?

A. Yes, sir.

Q. Are they what we would call blooded cattle?

728 A. That is the American term. When we speak of a certain breed the presumption is that the cattle are pure in that breed.

Q. Great care is taken in breeding them, is there not?

A. Not very great.

Q. Is there not great care in keeping them pure, and are they not valued according to the purity of their strain?

A. Yes, sir.

Q. How do they identify the different breeds?

A. They have a herd book for each.

Q. Every thoroughbred cow or calf is noted in this herd book, is it not?

A. Yes; they are supposed to be. In the polled Angus they cannot get in without being qualified on both sides, but in the Galloway herd book they did admit those that had been qualified on the male side only, and that is true of a large entry in the year in which these cattle came over, and I believe that some of those cattle would not, very likely, be qualified on both sides, though, not having seen the pedigrees, I would not say.

Q. They are very careful in keeping these strains pure?

A. Yes, sir.

Q. Are not these cattle valued very much with reference to the families from which they come?

A. To some extent.

Q. Are there not certain families that have become particularly distinguished in those breeds?

A. Yes, sir; more in the polled Angus than in the Galloways.

Q. Thus their value is very much according to the fancy of the breed, is not it?

A. Yes, sir; one buyer will buy one particular strain and another will buy a different strain.

729 Q. Don't some strains have a much greater value than others?

A. Quite true.

Q. Is not their value determined somewhat by their condition, whether they are with or without blemish?

A. Do you mean in their breed or in their body?

Q. In both.

A. There may be a slight blemish in their body which would not affect them in breeding, and there may be a blemish in the breed which would affect them very much.

Q. What is the true color for polled Angus?

A. Black.

Q. And for polled Galloways?

A. A brownish black—black with brown on the top of the hair.

Q. Are not these cattle esteemed very much with reference to the color?

A. By some they are, and by some not. Not so very much with the Galloways, though they like them better with a brownish tint.

Q. That is considered the true type, is not it?

A. Yes, sir; though it does not by any means follow that it is essential.

Q. Would not one with a proper color, everything else being equal, sell for a much higher price on account of that fact?

A. The color would be one of the points. There are distinguishing characteristics, which, taken altogether, make an increase in value, but one particular point would not.

Q. But according as they have the different points they are valued, are they not?

A. To some extent.

Q. And sometimes they reach a very high value?

A. Sometimes; but not very many of very high-valued ones come to this country.

Q. What is the highest price of this breed that you have ever known?

A. I have seen very high prices quoted in the newspapers.

Objected to.

The WITNESS: We do not bring the very highest into this
730 country. I could not speak from memory as to the highest price that I have known them to sell at. I will tell you the highest average ever made for a surplus of one herd every made in Scotland. To the best of my memory it was two hundred and twelve guineas for Lord Airlie's cattle.

Q. From your acquaintance with these cattle, what is the extreme price got for them in this and the old country?

A. I would rather deal with averages than with a particular animal. The highest price I had myself was an offer of $700 for a bull of Lord Airlie's stock, and the animal was expected to take the cup at Perth, and took three first prizes in this country. Animals will be sold all the way up to perhaps $2,500.

Q. As a matter of fact, have they not been sold as high as $8,000?

A. Not that I am aware of.

Q. Those that sold for $2,500 were sold on account of their breeding and the points they were supposed to have, were they not?

A. They were good specimens, both as to breeding and to individual merit, by which I mean the merit of the animal itself irrespective of its breeding.

Q. Isn't it a fact that with reference to the polled Angus and Galloways the same thing is true as is true of all other highly bred stock—that is, that their value depends on their breed, their pedigree, and their merits?

A. Yes, sir.

Q. And that their value is not merely for the quantity of beef?

A. Certainly not.

Q. You know nothing about the pedigrees of these cattle in controversy?

A. Nothing at all.

Q. How did you happen to go to the farms of the plaintiffs?

A. I was asked to go by Mr. Baldwin.

731 Q. How did you happen to become acquainted with Mr. Baldwin?

A. He was sent to me by a gentleman in Iowa.

Q. You didn't go for fun, I suppose?

A. I went for payment. I never do anything of that kind for fun.

Q. You then went as an agent of the railroad company?

A. I was employed by the railroad company, but I was not their agent.

Q. You say you were paid for your services?

A. Yes, sir.

Q. And went with Mr. Baldwin, who was the agent of the railroad company?

A. Yes, sir.

Q. With reference to the Leonard cattle, there are thirty-five heifers in your memorandum marked "three, footsore; one, much, $300." How do you arrive at that?

Counsel for defendant objects to testimony as to the amount of damage to the cattle, as that was not called out in the examination-in-chief, and as not being competent evidence.

A. I arrived at it by asking myself if those animals had been mine how much I would have considered would make me square—how much it would have cost me to wait for their recovery—and I think the sum I estimated would have been ample.

Q. How did you arrive at that sum?

A. Just through my brains—the way I do anything else.

Q. What do you mean by "three, footsore; one, much"?

A. The three were just noticeable, but the other was very noticeable.

Q. What do you mean by footsore?

A. I do not think that anybody who knows the English language can have any difficulty in arriving at what footsore means. I mean sore of the feet, so much as to be noticeable.

Q. Did it make them lame?

A. Just noticeably lame—not seriously.

732 Q. Did you put $100 on each one of these?

A. I don't recollect, but I put $300 on them altogether. You cannot divide those things mathematically. You have to put to yourself the question if those animals were yours what would you take against those defects.

Q. Did you have any reference to the difference in the market value if they were sold?

A. I had to estimate that in a rough way; but if the cattle had been mine, viewing them as they stood, to the best of my knowledge

I would have been quite satisfied to have $300 against the injuries they had sustained.

Q. "Twenty-nine heifers—three said to have aborted and one a little dull." How much did you give for the abortions?

A. Whatever is stated in the memorandum. That is the way I viewed it at the time.

Q. What do you say you allowed for the abortions?

A. I could not say. I estimated the damages just as if the cattle had been mine.

Q. So you can't remember now the consideration that moved you then? You don't remember now how you arrived at the value, except on the basis of the supposition you have stated, that the cattle had been yours?

A. No.

Q. You can't say whether you considered the value of the calf that was lost or the injury to the mother consequent thereon or what was the difference in the market value?

A. I took it on the general basis that I have told you.

Q. What would be the value of a healthy calf?

A. It depends a great deal on how it is bred and what the calf is like of itself.

Q. You didn't know what the calf was?

A. No; nobody could know.

733 Q. What value did you put on this one that was a little dull?

A. I forget exactly how I arrived at it.

Q. How old was that heifer?

A. Two years old, as far as I remember.

Q. Do you remember her color?

A. She was black.

Q. Had she any blemish or defect?

A. Nothing that I could notice, but just dullness, so dull as to warrant me in thinking that she had either overfed or was out of order in some way or had got a hurt; nobody who sees an animal dull can tell what is the cause.

Q. What did you value her at?

A. I could not say now; whatever is there I considered just for those four. I don't recollect how I divided it.

Q. Is a cow necessarily injured by abortion?

A. She may or may not be. I have known them not a bit the worse for it, and again I have known them a good deal worse.

Q. Is not it generally the case that after she has aborted she is not a good mother?

A. It does not follow that she is not as good a mother, but the supposition is that she will abort again.

Q. She is not as good a breeder?

A. She may not breed so successfully again.

Q. I suppose her value would depend somewhat upon her breeding qualities, would it not?

A. Certainly.

Q. You can't tell very well whether the animal is injured from

A. I could not say; very likely not half of it; I allowed for its family.

Q. Here is an item of $450.

A. The reason I allowed that is that there might easily have been some inward hurt to those that were along with those that were killed, and I was anxious to include everything. It was quite evident that the Leonard cattle had sustained the worst of the
737 wreck, and I put on a sum to cover the internal injury.

Q. It was a sort of guess-work?

A. Yes, sir.

Q. You had no way of getting at it?

A. No, sir; but seeing the animals all there in good condition, if they had been mine I would have been contented with the amount. That is the position I tried to put myself in.

All of the foregoing testimony in relation to the values or the amount of damage sustained was objected to at the time by counsel for defendant on the ground that it is not proper cross-examination and not competent evidence.

Q. I now direct your attention to the memorandum from which you have testified, entitled "A statement of the condition of sixty-nine cattle inspected at the Estill farm September 27, 1883," which memorandum you have stated was made at the time of its date.

A. Immediately after. I made a memorandum at the time and afterwards put it in form.

Q. "Eight bulls, one a little stiff; injury, $25." How did you get at that value?

A. Because I thought there was not much the matter, although he showed a footsoreness.

Q. "49 cows, heifers, and calves, one very stiff, $100." Do you remember the value of that one that was very stiff?

A. I thought to myself if the animal had been mine I would take $100 to cover the stiffness.

Q. "One bull in the house, stiff, damage $90; one heifer in the house, footsore, damage $65; one calf, almost worthless, damage $125; one calf, said to be lost after calving, $150."

A. They told me that there was one calf lost after calving, which they attributed to the accident. In every case where I put "said to be" it was said by the owners, and I allowed it on their statement, considering that they would not tell an untruth about it. The cow was a very nice one, I think.

Q. The total damage was $600. That is the estimate you
738 made and reported to the railroad company for the injury caused to these cattle?

A. Yes, sir; but that included not only the injury that may have been sustained in the accident, but included all the footsoreness that would be in an ordinary voyage, because I could not tell how much was attributable to the accident, and nobody could. I included everything.

Q. With these exceptions, the others looked very well, you said?

A. With the exception of that calf which was rendered useless

and which might have been by being trampled on as much as by the accident, there was nothing very serious in the whole lot. There was no abortion claimed except that one and I saw none that showed signs of it, and consequently didn't take it into account.

Q. Please state where you got your knowledge of the value of cattle.

A. I have already stated that, I think.

Q. How many cattle have you ever sold yourself in America?

A. I have ordered and sold somewhere about one hundred and five at two different times.

Q. Those are the only cattle that you have actually sold?

A. Yes, sir.

Q. Where did you sell those?

A. Part in Kansas City and part in Iowa.

Q. Where in Iowa?

A. I do not care to say where. It was a private sale. I did not sell any at public sale.

Q. Have you ever been at any auctions where polled Angus and Galloway cattle were being sold in this country?

A. No, sir. I never followed the auctions. I knew the prices well enough when I saw the reports of the sales.

Q. You were not there to see the cattle when they were sold?

A. No, sir; except that I saw some at Chicago. I saw Cochran's there.

Q. When was that?

A. That was about January, 1884.

739 Q. Did he withdraw his cattle?

A. Yes, sir; he sold a few and then withdrew the rest.

Q. Did you ever attend an auction sale in Kansas City?

A. No; that was not necessary, because I knew the cattle and the prices they were bringing.

Q. Your information is obtained entirely from the fact that you have sold two lots in this country and you have kept up with the reports of the market?

A. Yes, sir; but I knew the cattle in the old country from boyhood up. In this country I have got a general idea, the same as other folks. I was mixing a good deal with cattlemen, and knew from them as well. My information was not from any one source.

Q. What time of year are such cattle as these generally sold?

A. At any time that you get a good price.

Q. Don't they sell better at certain seasons of the year?

A. To some men they sell better at one season, and to other men at a different time. Ranchmen will buy more readily in spring, and farmers buy them just as it happens to suit.

Q. There are not many sold during the winter?

A. They sell all the time, only it is generally in the fall or spring that they are sold at public sale. I think Matthews has been selling them in small quantities every now and then. The larger portions are sold at public sale. One does not notice so much the private sales.

Redirect Ex.

Redirect examination by GARLAND POLLARD, Esq.:

Q. Did you see either of the Messrs. Leonard in Scotland when they were buying these cattle?

A. I think I saw two of them in Dumfries just before I left to come to this country in May, 1883. I don't know their names. I was just merely introduced to them. I saw two lots of cattle that I think they bought, and in looking over them here Mr. Leonard admitted that they were the finest lot he had. He admitted
740 that they were from Mr. Biggard's herd; there were sixteen or twenty of them, speaking from memory.

Q. How did they compare with the balance of the lot?

A. They were far the best, with the exception of two or three very fine animals bought from Mr. Cunningham.

Q. How did their looks and condition as you saw them in Scotland compare with their looks and condition when you saw them at Mount Leonard?

A. They looked equally well at Mount Leonard. As I said, they had been very well kept and fed, and were in fine condition for cattle newly landed.

Q. In valuing these cattle in your testimony have you assumed that they were in the herd book and were pedigreed cattle?

A. Yes, sir; but how far they were bred and pedigreed I don't know; that applies much more to the polled Angus, for that herd book has been much longer in operation.

Q. You have assumed that they were all in it?

A. Yes, sir. I took them as though they were in the herd book; otherwise they would not be worth importing.

Q. Have you stated everything that took place?

A. Yes, sir. I think the substance is pretty well stated.

By Mr. SEDDON:

Q. I believe you stated that a highly bred animal would be injured much more in proportion to its value than a common animal?

A. Certainly; because pedigree and breeding constitute a great deal of their value.

Signature waived.

Certificate and signature and seal of—

ROCHESTER FORD,
Notary Public.

741 *Testimony of Geo. F. Geagan.*

GEORGE F. GEAGAN, sworn on behalf of the defendant, testified as follows:

Direct Ex.

Direct examination by Mr. POLLARD:

Q. What is your full name?
A. George F. Geagan.
Q. Where do you reside?
A. In Jersey City, New Jersey.
Q. How long have you resided there?
A. For two and a half years.
Q. Where did you reside prior to that?
A. Chicago.
Q. How long did you reside there?
A. Very near three years.
Q. What is your present business?
A. Live-stock agent of the New York, Lake Erie & Western railroad.
Q. You have charge of that entire business?
A. Yes, sir.
Q. How long have you been acting in that capacity?
A. I have been in the live-stock business, directly and indirectly——
Q. I mean in the employ of the Erie.
A. About two and a half years.
Q. What capacity prior to that?
A. I was live-stock agent of the Chicago & Atlantic.
Q. Where?
A. Chicago.
Q. How long were you live-stock agent of the Chicago & Atlantic?
A. I was there about three years.
Q. What were you doing prior to that?
A. I had charge of the stock yards and loading at Buffalo for the Erie.
Q. For any particular road?
A. For the Erie railroad and their connections.
Q. Union stock yards, for all roads?
A. No; it was run under the National Stock Yard Company, and we loaded cattle for Boston, Philadelphia, New York, and intermediate points.
Q. Did it handle stock for all roads running into Buffalo?
A. No, sir.
Q. How long were you acting in that capacity?
A. I was there about eight years.

742 Q. I suppose that your business, as you have stated it, has brought you in contact a good deal with cattle and the shipment of cattle?

A. Yes, sir.

Q. Do you remember the time of this wreck at Nankin?

A. Yes, sir.

Q. Where were you then?

A. I was in Chicago, with the Chicago and Atlantic railroad.

Q. You were then, at that time, live-stock agent of the Chicago & Atlantic?

A. Yes, sir.

Q. Are you one of the parties that accompanied Mr. Baldwin and Mr. McCulloch?

A. Yes, sir.

Q. To Estill and to Mt. Leonard?

A. Yes, sir.

Q. Please go on and state whether you saw these cattle with them and made an examination.

A. Yes; I went with them.

Q. What was the result of it? Take the Estills'.

A. I didn't make any detailed statement of it. We got to Estill. Mr. Baldwin, he acted as spokesman for the party. We looked through the cattle. They took notes of everything they came to—Baldwin and McCulloch. I didn't do that. There were four or five of them that were a little stiff, and one cow had what they call——

Mr. POLLARD: You are speaking of the Estill cattle?

A. Yes, sir—what they call a tender foot; it was matterated between the two hoofs. There was one calf there that had been stepped on, I think, on the left thigh; it looked as if it was worthless to me. That is the sum and substance of it.

Q. About how old was the calf?

A. I could not recollect exactly.

Q. A month?

A. It might have been; it might have been older.

Q. Go on with the rest of them, as far as you can recollect.

A. With the Leonards'?

743 Q. No, with theEstills'?

A. That is about all. I didn't see no cattle there that anybody would think that had suffered any great injury; they all looked first rate, except these three or four looked a little stiff, and there was one cow there looked as if she had calved; she was pretty stiff; the rest of them, I thought, looked in very good shape.

Q. Were there any animals in the stable?

A. Yes, sir.

Q. The Estills'?

A. They had some in different stables; just exactly how many, I don't recollect.

Q. Do you remember how many bulls were in the stable tied?

A. There were some bulls in the stable they claimed was injured. I didn't see anything about them; any one would think they were injured bad enough to be disabled.

Q. Were those cattle that were tied up in the stable let out so that you saw them move about?

A. I think they was.

Q. How was it with those; did you see them move round?

A. They walked up and down themselves without any urging at all.

Q. Did you see any that could not move round?

A. No, sir; this cow they had tied up in the stable, we didn't have her out.

Q. That is the one you say had matter in the foot?

A. Yes, sir.

Q. You went over all the cattle?

A. Yes, sir.

Q. You made no memorandum at the time?

A. I didn't.

Q. You simply speak from——

A. From general observation.

Q. Was there anything said by the Estills when you got there?

744 A. Mr. Baldwin, I believe, asked Mr. Estill to point which ones were injured; they said we was there for that purpose, and to find out for our own selves; that was about all that was said.

Q. Did they in fact point out any cattle they claimed were injured?

A. I could not say that they did; they went around, showed us all the cattle, though; we looked at them.

Q. Was there anything said about pedigree?

A. I don't recollect about pedigrees at the Estill farm.

Q. Do you recollect anything being said?

A. I don't recollect that there was anything said about it; I didn't hear it if it was.

Q. Is that all you recollect about the cattle at Estill?

A. That is all; they were all in good condition, I thought, considering the journey.

Q. Did you observe any that were permanently injured?

A. No, sir; none at all, only the calf.

Q. Go on with the Leonard farm.

A. We got there in the morning; we went up; Mr. Baldwin, he told them what we wanted; he asked him for the pedigree, and, if I understood it right, they claimed they hadn't got them yet, or that they didn't amount to anything, or something to that effect.

Q. Did they produce them?

A. No, sir.

Q. Go on and state what you did and what you recollect about the condition of the cattle.

A. There was a bull there that had a crack in the right hind foot. They claimed it was hurt pretty bad; I didn't think so.

Q. Did you see it yourself?

A. Yes, sir.

Q. Where was it?

A. I think it was kind of under a shed when I saw it, if I recol-

lect right; a kind of bull yard. Then there were two or three heifers; I think they claimed one had aborted. There was a few that was a little stiff, kind of footsore, as if they had been on
745 the cars some time, something to that effect. Anything else— I could not see anything was wrong about any of them further than would get well in time.

Q. Did you see them all moving about in the pasture?

A. I am pretty certain we did.

Q. You went round with them?

A. I went right round with them.

Q. Was there anything said about aborted animals? Did they point out any?

A. I think they pointed — one heifer or two they claimed had aborted. There was an argument between them—Mr. McCulloch and the Leonards. Mr. McCulloch seemed to think they had not; neither did Mr. Baldwin. Mr. Baldwin asked one of the Leonards where the fœtuses was; if they had them. He claimed the hogs had eaten them, or something to that effect, or buried, or something.

Q. Did you observe any of the cattle at Mt. Leonard? Did you go over the farms of all the Leonards?

A. Yes, sir; I went with Mr. Baldwin and Mr. McCulloch.

Q. Did you also go out to see some cattle, fifty or sixty head, on another farm, five or six miles away?

A. Yes, sir.

Q. How did you find them?

A. They were all in good condition. There was one had a little mark on its jaw somewhere—a kind of flesh wound. They were all in good condition.

Q. Was there any conversation with the Leonards after you had finished the examination of the cattle as to damages? I don't ask about the amounts.

A. At the hotel.

Q. That was after you got through?

A. Yes, sir; Mr. Baldwin and Mr. McCulloch and Elliott and the Leonards met down at the hotel after we got through that evening, and conversation came up in reference to settling.

Q. Was there anything said about the apparent condition of the cattle? Did either of the Leonards say anything about the apparent condition of the cattle?

746 —. Yes, sir; one of the Leonards said that anybody, to look at them, not being told they had been in a wreck, would think they had been.

Q. How did he happen to say that?

A. Mr. McCulloch and they got to arguing between themselves in reference to the damages. That was one remark that happened to come.

Q. What kind of damages was Mr. Leonard insisting upon?

A. As I understood it, consequential damages—that is, what would come hereafter, such as abortions, and so on.

Q. Something they could not see?

A. Yes, sir.

Q. What objection did Mr. McCulloch make to that? What reply did he make to that?

A. Mr. McCulloch said he was given instructions to come there and make his examination; estimate the damage, just what he thought was right. He told Mr. Leonard——

Mr. COSGROVE: When Mr. McCulloch was a witness he testified to it.

The COURT: Anything he heard Mr. McCulloch say there in the presence of the plaintiffs he may testify to.

(By Mr. POLLARD:)

Q. Did they come to any conclusion?

A. No; they did not. When Mr. Baldwin told them what Mr. McCulloch said the damages would be they said it was not nowhere near their figures and they could not be entertained. Mr. Baldwin said he could not do that even without seeing the officers of the road.

Q. Was that the point of difference between them—consequential damages, as you say?

A. Yes, sir.

Q. Was that the objection Mr. Leonard made to Mr. McCulloch's figures?

A. That he hadn't taken into consideration——

Mr. COSGROVE: I object to that.

The COURT: Let him state what was said.

Ans. I could not exactly say how that conversation came. They were all talking together at that time. One was saying
747 one thing and one another.

Q. Did you see those cattle when they passed through Chicago?

A. I saw some of them in the cars. I didn't get in all the cars. I walked along the cars and see them standing there.

Q. Where were they then?

A. They were at the stock yards. I think they were there six or eight hours. I think maybe a little longer.

Q. Was anybody with you when you made the examination?

A. No, sir; none that I recollect of.

Q. State what kind of an examination you made.

A. I didn't make no regular examination; the cattle came in there; we were looking for a place to unload them; they would not have them unloaded at the yard on account of being afraid of Texas fever.

Q. Did those representing the railroad request to have the cattle unloaded so they could be examined?

A. Yes, sir.

Q. They declined?

Mr. COSGROVE: I object. Let him state what was said.

The COURT: What was said?

Ans. They wouldn't unload them in the yards, for they were afraid of Texas fever. There was no other place we could get to unload them.

Q. Who made that objection?

A. Mr. Leonard and Mr. Estill both.

Q. Which Leonard?

A. Mr. Abiel Leonard was there.

Q. They were not unloaded?

A. No, sir.

Q. For what purpose did the railroad company request the unloading?

A. They wanted to examine them.

Q. For what purpose?

A. To see whether they was hurt any, or anything of that kind.

Q. How many car-loads of the cattle did you see at Chicago?

A. I went by all of them.

Q. What kind of cars were they, open cars?

A. They were rack cars; some were palace cars. I don't
748 think all of them was; there was some of them.

Q. How many of them?

A. I don't recollect.

Q. Could you see into the palace cars?

A. Yes, sir.

Q. They had slats?

A. Some of them.

Q. So you could see in, and the others were common slat cars, so you could look through and see the cattle?

A. Yes, sir.

Q. So far as you saw, did you observe any injuries to the cattle?

A. No, sir; I did not.

Q. There were no particular cattle pointed out as injured there?

A. No, sir; there was none pointed out. I don't know but there was some Verden stock cars; they are not slats; you can look in the door.

Q. You did look into those?

A. I looked in some of them.

Cross-Ex.

Cross-examination by Mr. COSGROVE, for plaintiffs:

Q. Mr. Gegan, those stock yards at Buffalo you say you had charge of for the Erie railroad are where cattle being shipped to market are unloaded and rested and fed, are they not?

A. Yes, sir.

Q. Then transferred to some other road or sent on?

A. Shipped on the Erie and connections with different roads.

Q. For fat cattle going to market?

A. Yes, sir; and cows.

Q. Almost exclusively?

A. Yes, sir.

Q. Very few breeding cattle?
A. Very few; yes.
Q. Do you ever recollect any imported cattle coming through from the East being put off at the stock yards at Buffalo?
A. No.
Q. You have had no experience in the transportation or management of herd cattle like these—imported cattle brought West for breeding purposes?
A. I have seen them in Chicago.
Q. Black cattle?
A. A few of them.
Q. You think it would have been a prudent thing to have unloaded these cattle in the stock yards where Texas and
749 Spanish cattle were being unloaded constantly at the stock yards in Chicago?
A. Not if they were put in pens where there had been Texas cattle.
Q. Your stock yards there—you put in all kinds of cattle, don't you?
A. We had sheds there at that time there had never been no Texas cattle in.
Q. At that time?
A. Yes, sir.
Q. The objection that Mr. Leonard made and Mr. Estill made was to having their cattle put in the stock yards where Texas cattle were, and thereby having the Texas fever become a contagious disease, which would destroy them or might be brought into their herd. Wasn't that their objection?
A. That was the objection; yes, sir.
Q. They made no objection to your examining the cattle?
A. No, sir.
Q. But objected to their being unloaded and put into that place on account of contagion. Now, you say when you got to the Estills' farm—what train did you come there on—from which direction did you come to Estill?
A. We came from Quincy there.
Q. On the regular passenger train of the M., K. & T.?
A. I believe it was.
Q. It was the evening passenger train?
A. We got there, I think, about 2 o'clock, if I recollect right.
Q. You came in on the passenger train. It was the regular train, wasn't it?
A. I believe so.
Q. You are not positive of the time the train arrived there?
A. I am positive. I think along about two o'clock, if I recollect right.
Q. You made no memoranda yourself of the damages to the cattle?
A. No, sir; I did not.
Q. How long did you remain there—what time in the evening did you go away?

A. It must be along ten or twelve o'clock; along there; it was after supper.

750 Q. What time did you get through inspecting the cattle?

A. I should think it must be along five or six o'clock.

Q. Before dark?

A. Just before dark.

Q. That was on the 27th of September, 1883?

A. Yes, sir.

Q. How many head of cattle did you examine?

A. It was sixty-nine head of cattle.

Q. Were they in different fields?

A. Yes, sir.

Q. How many fields?

A. I should think there was one big lot in one field; then others were around the barns—barn yards.

Q. How far apart were they?

A. I should not think they were a quarter of a mile apart.

Q. Were they all bunched together or spread out?

A. They were kind of bunched together in the lot, the biggest lot in one field. Then there was one kind of separate.

Q. When did you reach there?

A. About four o'clock.

Q. Then you were not more than one or one and a half hours examining the cattle?

A. We got there before four o'clock.

Q. Assuming you got there at three and a half or four o'clock, do you think you had sufficient time to thoroughly examine those cattle?

A. Yes, sir.

Q. I understood you to say you just made a casual examination by looking at them; just passed through them and looked at them as you went along.

A. Looked over both sides, up and down, two or three times.

Q. You say you saw three or four you thought were considerably injured. What were they, cows or bulls?

A. One or two cows and a couple of bulls.

Q. What was the character of the injury to the bulls?

A. They acted a little stiff. Nothing extraordinary, I think.

Q. Was that two bulls?

A. I think two bulls; one or two, anyway. I could not tell exactly now whether all bulls or not.

751 Q. Did they move freely or just appear to be sore in their bodies or feet?

A. Just a little sore feet; what anybody else would term stiff.

Q. You didn't think it amounted to much?

A. I did not.

Q. You didn't think that affected their market value at all?

A. I did not.

Q. Didn't it?

A. It didn't materially.

Q. Do you think that the market value of those cattle that were stiff and sore was affected?

A. Not to any considerable extent.

Q. Supposing five of these cows—two aborted immediately after the train left Nankin, one before the train got to Chicago, one aborted on the way from Chicago to Estill, and one in a day or two after, what would be your impression about the damages?

A. I could not state exactly what the damage was, for I am not posted in abortions.

Counsel for defendant objects. Objection sustained.

Q. I will ask your honor, if that were a fact, do you think it would have been injurious to the herd?

Mr. POLLARD: I object. He says he knows nothing about abortions.

The COURT: You may ask him that to test his knowledge.

Ans. That is something I could not tell.

Q. I understand your evidence to be that so far as any damage or effect that was caused to the herd by abortions or otherwise, you cannot fix what it would be—make any estimate of it?

A. No, sir.

Mr. POLLARD: He has not stated anything about that in his examination-in-chief.

Q. I understood you to say there was nothing, to your recollection, stated at Estill about the pedigrees of those cattle?

A. I didn't hear anything said that I am aware of.

Q. You were with Mr. Baldwin and Mr. McCulloch during all the time?

752 A. I was there with them, but I was not always right up close to them.

Q. On the evening of the 27th you left there to go to Mt. Leonard, in Saline county?

A. Yes, sir.

Q. You took the north passenger train, the passenger train that goes to Higby or Moberly?

A. I could not tell you whether I did or not?

Q. You went on the C. & A. road?

A. Yes, sir.

Q. You got there next morning?

—. It was about four or five o'clock to the town.

Q. You got to Higby or to the place where you change cars and remained there till three or four o'clock in the morning?

A. I think we got to Mt. Leonard about four o'clock in the morning—something like that. It was early; they had just got up at the hotel.

Q. When you got to Mt. Leonard you drove out to Leverett Leonard's farm?

A. We walked out there.

Q. How did you go through the herd, walk or ride?

A. Part of the time we walked; part we rode out to see some of them.

Q. Who rode and who walked?

A. Mr. Baldwin, Mr. McCulloch, and myself. We rode and walked around the farm. When we first got there, right in the immediate neighborhood of the barn, then Abiel Leonard, I think it was, took us out to the lots where there were others.

Q. You rode through the different fields where the cattle were in a spring wagon or buggy or whatever it was?

A. Part of the way some of them got out and looked at some of them.

Q. Did Mr. Baldwin get out of that wagon the whole time?

A. Where?

Q. Did he ever get out of that wagon from the time just as he entered the field, after he got into it, while going through the cattle?

A. We went into two or three different lots. I know he got out; stayed out an hour or more.

753 Q. How often did he get out?

A. I won't swear to that because I don't recollect.

Q. Were you in the buggy with him?

A. I was in the wagon; yes.

Q. Did you get out?

A. I got out some places; some places I didn't.

Q. Mr. McCulloch got out, did he?

A. Yes, sir; I am pretty certain he did. I won't swear even to that, for I don't recollect.

Q. You are quite certain Mr. Baldwin got out?

A. I think Mr. Baldwin got out every time Mr. McCulloch did. I won't swear how that is because I don't recollect it particularly.

Q. You think Mr. Baldwin got out every time Mr. McCulloch did? You are not sure whether Mr. McCulloch got out at all?

A. I know in some places they did—I know they did some places there.

Q. You made no memoranda at the Leonards'?

A. I did not.

Q. All you testify to now is your general recollection?

A. My general recollection.

Q. You say Mr. Baldwin, was it, asked Mr. Leonard for the pedigrees of these cattle?

A. Yes, sir.

Q. Which one of the Leonards did he ask?

A. I think there were three of them there together, I think.

Q. You don't know whether he addressed his remark to any one particularly?

A. I could not say that for certain.

Q. Did he ask or merely intimate?

A. I think he just says, "I would like to see the pedigrees of these cattle." I think Mr. Abiel Leonard says, "We have not got them yet," or something to that effect. They didn't produce them, anyway.

Q. They didn't refuse?

A. Just simply said they hadn't got them, or something to that effect; that is about the sum and substance of it.

Q. Didn't they tell you the pedigrees were still in Scotland being made up and they didn't have them?

754 A. I didn't hear that part of it.

Q. You looked through these cattle as you have stated—you, Baldwin, and McCulloch—and you saw no special injury?

A. I did not; no, sir.

Q. Nothing you thought could be attributed to the effect of that wreck?

A. No, sir.

Redirect Ex.

Redirect examination by Mr. POLLARD, for defendant:

Q. Did you see anything but what you thought they would recover from?

A. No.

Q. In the course of a few weeks or a month?

A. No, sir; nothing at all.

Q. How long were you engaged in the examination—what time did you go out to see their cattle?

A. We got out, I should think, by seven o'clock; we stayed there till—it must have been four or five o'clock before we got through; I don't know but a little later.

Q. In relation to getting out of the buggy, did you go to all of the lots in the wagon?

A. No, sir; we walked out to some of them.

Q. About how many?

A. I think there were three or four in the immediate neighborhood of the barn—around the barn yard and in the barn—that we looked at.

Q. Did you examine each animal separately there?

A. Those particularly, I went there with them; looked them over.

Q. How many lots did you ride through in the wagon?

A. That is something I cannot recollect; there were a good many of them. We went to a great many different lots all round the farm. Some we went through didn't have cattle in; then there were others did have them.

Q. Isn't it a fact Mr. McCulloch and Mr. Baldwin got out of the wagon in every lot or field?

Counsel for plaintiffs objects.

The COURT: You may answer.

755 A. I cannot swear positively about that, but my impression is they did.

Q. And did they go round amongst the cattle and make personal examination of the individual cattle there?

A. That is my idea.

Counsel for plaintiffs objects as leading.

The COURT: The question is leading, Mr. Pollard. Let him state how they made the examination.

WITNESS: I think they went personally round every steer, cow, and heifer. They examined them. I don't know personally about that, for I don't recollect exactly how it was. I am pretty certain they did.

(By Mr. COSGROVE:)

Q. Do I understand you to say there were any cattle near Mr. Abiel Leonard's farm, on his place, or in his barn?

A. I could not tell which farm, who owned the farm.

Q. Mr. Abiel's is on the north side of the road.

A. I could not tell which way is north or south there.

Q. Down further from the railroad depot there.

A. I could not tell you whose it was; which way, east or west, or which one was furtherest from the railroad now.

Counsel for defendant then read in evidence the deposition of Dr. James Law.

Deposition of James Law.

Deposition of James Law, a witness on the part and on behalf of the defendant, taken before John B. Pine, a notary public in and for the county of New York, in the State of New York, at his office, in the city of New York, on October 11th, &c., 1884, in the presence of James W. Pryor, of counsel for the defendant, and J. Arthur Barratt, of counsel for the plaintiffs.

JAMES LAW, called as a witness on behalf of the defendant, having been first duly and publicly sworn by me that he
756 will testify the truth, the whole truth, and nothing but the truth in answer to such questions as may be put to him, doth depose and say as follows:

Questions by J. W. PRYOR:

1 Q. State your name, age, residence, and occupation.

A. My name is James Law; my age is forty-six years; I reside at Ithaca, N. Y.; my occupation is that of professor of veterinary science, Cornell university.

2 Q. Are you a graduate of any veterinary college?

A. I am a graduate of the Royal College of Veterinary Surgeons in England, and have a degree granted me by the Highland and Agricultural Society of Scotland. I am also fellow of the Royal College of Veterinary Surgeons.

3 Q. How long have you practiced veterinary science?

A. Since 1857.

4 Q. Where have you practiced veterinary surgery?

A. In Scotland, England, Ireland, and the United States.

5 Q. Are you still practicing?

A. Yes; still practicing.

6 Q. What position do you hold at present?

A. I hold the professorship of veterinary science at Cornell university.

7 Q. Are you familiar with the breeds of cattle known as Galloways?

A. Yes.

8 Q. Have you had much experience in cases of abortion in cows?

A. A good deal.

9 Q. In your opinion as a veterinary surgeon, what effect has an ordinary voyage across the Atlantic upon the general condition of cattle?

A. The tendency is to render them fatter and softer—more impressible to causes of disturbance of health.

10 Q. Apart from the mere effects of the voyage itself, is there any special danger involved in the handling of cattle—that is, in loading and unloading?

757 A. Yes; the crowding in the gangways or the lowering upon lifts.

11 Q. Both in the loading and unloading?

A. Both loading and unloading render the animals liable to be injured.

12 Q. This particular condition of the cattle that you describe as resulting from a voyage is caused by the lack of exercise?

A. The lack of exercise, together with the feeding; but especially by the lack of exercise and the warm, moist atmosphere in which they live between decks.

13 Q. This condition is such, then, as to render them more susceptible to unwholesome influences of different kinds?

A. Yes.

Q. More susceptible to physical injury?

A. Yes; the muscles lose their strength and vigor, and all the tissues are relaxed, so that they become more impressible. The inevitable tendency to a deposition of fat applies also to the tendency to fatty change of the generative organs.

15 Q. In loading and unloading cattle in such a voyage, the injuries of the danger of which you speak are of what character?

A. They usually contract mechanical injuries running against portions of the gangways and perhaps in getting upon elevators or off them. One can understand the variety of injuries to which they are subjected, essentially mechanical injuries.

16 Q. May these injuries be internal without any external signs?

A. Those bruises and crushing will lead to injuries to internal organs without anything being shown externally.

17 Q. What is the effect upon the general condition of cattle of an ordinary railway journey of fifteen hundred miles?

A. Well, the effect must necesssrily be very exciting. The constant jarring sets the nervous system on edge and renders the

758 animals more excitable and impressionable than at other times.

18 Q. Are you familiar with the manner of handling and treating

cattle in a voyage across the Atlantic, especially the loading and unloading?

A. In loading and unloading I have examined the fittings on board ship & the amount of space furnished to each animal very carefully in some, the temperature, and the state of the atmosphere with regard to purity and impurity between the decks, and from my position recently, as chairman of the Treasury cattle commission was brought intimately in contact with this whole matter.

19 Q. How did your position upon the Treasury commission bring you in contact with this matter?

A. The commission is interested with the selecting of stations for cattle and with the fitting up of these stations, with the method of removing cattle from ships to these stations, and with the general management of the stations. We had the general supervision and the management. We had no executive power, and acted as counsel, but the executive work was put into other hands.

20 Q. Are you familiar with the methods of handling cattle upon cars and in railway journeys?

A. Yes.

21 Q. From personal observation?

A. From personal observation.

22 Q. Are you familiar with the quarantine at Boston and at Walton as it existed in the summer and the autumn of 1883?

A. Yes.

23 Q. From your personal observation?

A. Yes.

24 Q. What effect would you expect to be produced upon cattle by a voyage from Glasgow to Boston and a stay of six or seven weeks in the quarantine at Boston, and a railway journey of fifteen hundred miles?

A. I would expect it to be very trying to the general vigor
759 of the animals, though the cattle might actually be fatter at the conclusion of this journey than at the beginning. Fat is not vigor.

25 Q. Will cattle voluntarily swallow Paris green?

A. As a rule, yes.

26 Q. In your experience as a veterinary surgeon, have you known of cases of the swallowing of Paris green or other irritant poison by cattle?

A. It is very common—that is, using it in the generic sense.

27 Q. Have you known of such cases, in regard to Paris green, under your personal observation?

A. I do not at this moment recall a case.

28 Q. Have you known, in your experience, cases of cattle swallowing other and similar irritant poisons?

A. Yes.

29 Q. From your knowledge of the habits of cattle, would you expect cattle which were pastured in a field in which they had access to Paris green to swallow the Paris green?

A. Yes.

30 Q. Is there any flavor in the Paris green that makes it agreeable to the taste of cattle?

A. Yes; the metallic taste appears to be acceptable to them.

31 Q. What weight of Paris green swallowed at one time would kill a full-grown cow or bull?

A. Much would depend upon the fullness of the stomach with food and the activity of the stomach at the time, and the activity of the movements of the stomach at the time; if not carried out by vomiting or by purging, from a dram upward ought to be seriously poisonous.

32 Q. What is the general effect upon cattle, and upon cows with calf, swallowing Paris green in quantities not sufficient to cause death?

A. If the quantity were very small, and continued for a length of time, the action would be a tonic action, tending to improve
760 the general health and condition; if larger, then it would produce local inflammation of the muco-s membrane of stomachs and bowels, followed by formation of ulcers.

33 Q. In order to produce this tonic effect, must the quantity swallowed be very small?

A. The daily dose would be five or ten grains; rather less if in the solution.

34 Q. You are supposing, then, the use of Paris green as a medicine?

A. Yes.

35 Q. How long might the evil effects upon cattle swallowing Paris green in quantities not sufficient to kill continue?

A. For months, by reason of the persistence of the ulceration; and even longer, by reason of the formation of cicatrices in the healing of the ulcers.

36 Q. May the effects of poisoning with Paris green be apparent three or four weeks after the swallowing of the Paris green by the cattle, although at the time when Paris green was taken no marked symptoms of poisoning were apparent?

A. Yes.

37 Q. Will you explain how this may be?

A. Cattle do not show such marked symptoms of suffering as do horses and other animals with the same lesions; thus the preliminary inflammation might not be much noticed and yet ulcers might be formed.

38 Q. Are the cattle known as polled Angus and Galloways less susceptible to the effects of Paris green or other poison than cattle of other kinds?

A. I know of no reason why they should be.

39 Q. Have you had much experience with cases of physical injury received by cattle from the application, externally, of force?

A. Yes; a good deal.

40 Q. Have you treated many such cases?

A. A certain number; yes. In many cases treatment is not profitable.

761 41 Q. Have you examined many cattle which have been so injured?

A. Yes.

42 Q. You have examined many more than you have treated?

A. O, yes.

43 Q. Have you known in your experience cases in which the general condition of the cattle has been seriously injured by violent shocks or concussion, such as might result from a railroad collision, without the existence of direct physical injury?

A. No.

44 Q. Do you recognize nervous shock as a form of injury to which cattle are liable?

A. I recognize it as possible.

45 Q. Do you recognize it as an ordinary danger to cattle?

A. No.

46 Q. Have you in your experience known of cases in which cattle have suffered from nervous shocks alone?

A. I cannot at present recall a case, but I don't shut out the possibility of such a case.

47 Q. Do you think that the effect of physical injury upon cattle may be aggravated by the particular circumstances under which the injury is received?

A. Yes, sir.

48 Q. Do you consider these circumstances as an important factor in determining the results of the injury?

A. Yes.

49 Q. Might the breaking of the leg of a cow be much more serious in its results by reason of the attending circumstances not affecting the actual physical injury?

A. Yes; she might be exposed to putrid emanation that would cause septic inflammation of the wound, or her system may have already been brought to such a condition that an equally bad result may follow.

50 Q. Do you consider it probable that physical injuries, such as the breaking of a leg or internal injuries, would be much aggravated in cattle by the fact that those injuries were received
762 in a railway collision, in which out of about four hundred cattle four were killed?

A. No; as far as the injury is concerned, it would be the same wherever received—that is, apart from every outside influence, such as referred to in the matter of the poisoning, of wounds, &c.

51 Q. If you were called to treat a cow which was suffering from internal injuries, would you look for more serious symptoms because of the fact that the cow had received her injuries in a railway collision than if the injuries had been received under circumstances of no attending commotion or unusual excitement?

(Objected to by plaintiffs' counsel on the ground that question has been answered by the previous answer.)

A. A cow in a long railroad journey is in a condition of fever, which renders the effects of any injury more serious to her.

52 Q. How do such cattle as Galloways compare with cattle of other kinds in hardihood and ability to recover from the effects of physical injury?

A. They are especially hardy and healthy and recuperate readily.

53 Q. Are they nervously more or less sensitive than other kinds of cattle?

A. They are less sensitive than breeds of cattle that have been long pampered and kept in artificial conditions.

54 Q. In a general way, will you answer the last question, less or more?

(Objected to by plaintiffs' counsel.)

A. Less.

55 Q. What are the most usual causes of abortion or premature birth in cows?

A. Eating ergoted grass, smutty grain; all diseases of the digestive and urinary organs; all serious diseases that effect the system at large (I should have brought in before the diseases of the womb & generative organs); cows riding each other in the
763 fields; habitual lying on floors that incline backward, and serious physical injuries and irritant poisons.

56 Q. Have slips and falls sometimes a tendency to cause abortion?

A. Yes.

57 Q. Has inflammation of the bowels?

A. Yes.

58 Q. Has diarrhœa?

A. Yes; very much so.

59 Q. Has over-feeding?

A. Yes.

60 Q. Has plethora?

A. Yes.

61 Q. May abortion result from housing in hot, damp places?

A. Yes.

62 Q. May it result from muscular exertion, particularly after long rest?

A. Yes.

63 Q. May it result from high feeding?

A. Stimulating feeding; yes.

64 Q. May it result from breeding at too early an age, and may it result from proximity to slaughter-houses or dead or decomposing animal matter?

A. Yes.

65 Q. Would the death of a cow in a herd tend to cause abortion if pregnant cows were permitted to come near the carcass?

A. Yes.

66 Q. May abortion be caused by drinking foul water?

A. Yes.

67 Q. By drinking very cold water?

A. Yes; drinking to excess.

68 Q. Is the presence of ergot in cereal food a common cause of abortion?

A. It is quite a common cause; yes.

69 Q. Is it one of the most usual?

A. It is a very common cause. I do not know that I would venture to say it is the most common. In some localities it is the main cause, ergot being especially prevalent or abundant.

70 Q. Is ergot found in all kinds of grasses and cereals?

A. Ergot is found in all kinds of grasses and many cereals.

71 Q. Is this a cause of abortion always to be guarded against in a herd of cattle?

A. Yes.

72 Q. Is the danger of abortion from eating grasses or
764 grain increased by the fact that the food is dry?

A. Yes.

73 Q. Is it proper to feed pregnant cows upon dry corn meal or other similar food?

A. Corn meal as an exclusive diet. It is as a grain diet especially stimulating, and therefore objectionable.

74 Q. Is the abortion of one cow in a herd, from whatever cause, likely to lead to the abortion of others?

A. Yes.

75 Q. Why? That is, how does it act upon the other pregnant cows?

A. Accidental abortions (by which I mean those that are not due to a living germ) are caused by the sympathy of the pregnant animal with the aborting animal—cattle having a very acute sense of smell, as a natural provision for retreat from enemies.

76 Q. In what manner is this tendency to abortion communicated from one cow to another?

A. Apparently through the sense of smell affecting the nervous system.

77 Q. Are pregnant cows attracted by the cows which have aborted?

A. Yes.

78 Q. Does a distinct smell arise from a cow which has aborted?

A. Yes; there is a very heavy smell. They have a much more acute sense of smell than man.

79 Q. Is the danger of the spread of abortion in a herd in this manner recognized as a common one which must be carefully guarded against?

A. Yes.

80 Q. Is it inevitable that abortion will result from the exposure of pregnant cows to cows which have aborted?

A. Not inevitable, but highly probable.

81 Q. If thirty pregnant cows are so exposed, is it inevitable that some will abort?

A. Well, I would not put it in that way—absolutely as inevitable. It is highly probable.

765 82 Q. What protection would you think sufficient to prevent the spread of abortion in a herd of cows in this way?

A. The instant removal of the aborting cow and all her products and the deodorizing and disinfection of the building or place where they were.

83 Q. Would you consider it safe to keep in the same stable pregnant cows and a cow that had aborted?

A. Certainly not.

84 Q. Would you consider it safe to place in the stable in which a cow had aborted pregnant cows within twenty-four hours after the aborting cow had been removed?

A. No.

85 Q. How long a time after abortion may the tendency to communicate abortion to other cows be retained?

A. So long as the products of the abortion remain.

86 Q. By "the products of the abortion" do you mean the discharge resulting from abortion?

A. I mean the fœtus, its membranes, and its subsequent discharge from the cow.

87 Q. May these continue for several weeks?

A. Yes.

88 Q. May the tendency to abort be communicated although a cow which has aborted is not visible to a pregnant cow?

A. Yes.

89 Q. Would you consider it safe that the same man should have charge of cows that have aborted and cows with calf?

A. No.

90 Q. Why is it not safe?

A. Because he would carry the products and odors about his person and clothes.

91 Q. How long after exposure to a cow that has aborted may abortion take place in a pregnant cow?

A. It might be at once or it might be at that period which would have corresponded to her next period of heat had she not been pregnant.

92 Q. May it be a month?

A. It may be a month.

93 Q. May it be more?

A. It is not so likely to be more.

94 Q. What is the shortest time within which abortion may be caused in cows by the swallowing of Paris green?

A. It may occur on the same day.

766 95 Q. What is the longest time?

A. I could conceive of its being weeks or months if ulceration formed on the mucous membrane.

96 Q. Might such abortion take place some time after the poisoning, although the cow in the meantime showed no symptoms of poisoning?

A. Yes.

97 Q. In such a case would it be possible to determine the cause of the abortion?

A. Not in the living cow.

98 Q. You have spoken of physical injury as the cause of abor-

tion. Is physical injury to parts of the body not having direct connection with the genital organs likely to cause abortion?

A. Yes; if very severe.

99 Q. Is abortion in cows likely to be caused by a violent physical shock or concussion unattended with actual physical injury?

A. I have answered already that I have not seen a case of that kind. It is not likely without physical injury.

100 Q. Is abortion from physical injury, whether externally or internally, less likely to take place in Galloway cows than those of other kinds?

A. I do not think it would make a very material difference.

101 Q. Do the symptoms preceding abortion caused by physical injury differ from those in cases of abortion caused by irritant poison, such as Paris green?

A. No, except as far as they would be complicated in the one case by the symptoms of irritant poison.

Cross-Ex.

Cross-examination by J. ARTHUR BARRETT:

1 Q. Professor, how long is it since you were engaged in the duties of commissioner of quarantine in Boston?

A. Our commission expired by limitation on the 30th June last.

2 Q. While attending to the duties of that commission while you were located in Boston have you ever seen Atlantic steamers
767 that landed at Boston with cattle?

A. Yes, I have gone on board and examined them.

3 Q. How long since?

A. In July, 1883.

4 Q. What line of steamers, do you remember?

A. I could tell you if I had my note book here, but I do not remember just now.

5 Q. What was your experience while stationed in Boston as to the number of cows coming over by steamer having aborted?

A. I was not stationed in Boston, in the first place; I simply examined these cattle when on a visit to Boston; that is the only experience.

6 Q. Have you had any experience in examining cattle that have arrived from Europe other than that you have just mentioned?

A. At intervals I visited all quarantine stations; after we established a quarantine station at Portland I never visited that after its establishment.

7 Q. In your experience what proportion of cattle aborted in that way?

A. I can't exactly say; I know it occasionally happened.

8 Q. What generally was the condition of the beasts when they arrived?

A. In good condition generally.

9 Q. In your experience what is the usual time for retaining the beasts in the quarantine station?

A. Ninety days, inclusive of the ocean voyage.

10 Q. What treatment do they receive at quarantine?

A. They are kept secluded in their own yards, separate from the adjacent herds.

11 Q. If there are any cases of abortion in the herd what course is pursued?

A. I do not think any other course is pursued but to disinfect the place.

12 Q. Are not the beasts isolated?

A. There is no good opportunity for isolating them; at times, however, they do isolate the beasts under those circumstances.

768 13 Q. What further treatment do they receive as to exercise?

A. They are turned out in the yard for exercise, as a rule, but they are not allowed out of the yards; these yards average from one hundred to two hundred feet square.

14 Q. Have you had occasion to examine herds that have travelled across the Atlantic by steamer and as far as a thousand miles by rail?

A. I have seen herds in the West.

15 Q. How long after their arrival?

A. Well, some weeks after their arrival.

16 Q. That is the only experience you have had in examining cattle that have travelled as far as a thousand or fifteen hundred miles by rail?

A. Well, I have examined herds from eastern and western Europe; I have seen at Liverpool cattle that have travelled from the west to the east.

17 Q. Now, what proportion of those animals you have mentioned have aborted?

A. They were not pregnant.

18 Q. What experience have you had of pregnant cattle in that respect?

A. I have only had experience with those that have come here.

19 Q. How long after their arrival did you examine these?

A. I have seen them continually in the quarantine stations here, but it was a mere accident that I saw any after they travelled west.

20 Q. In saying that the tendency of travelling is to fatten cattle you refer to an average voyage?

A. Yes, a good voyage.

21 Q. In your experience is it a common thing to have a large number of abortions in beasts that are pregnant merely in railroad travelling?

A. Yes; it is not at all uncommon.

22 Q. How many; one in a hundred?

A. I should think so.

23 Q. Any more than that?

769 A. I could only state indefinitely; I know a good many do abort. They object to bringing cows all the way from Ohio; they prefer to buy in New York State.

24 Q. You say that more than one in a hundred would be apt to abort?

A. I should think so.

25 Q. Well, how many; ten in a hundred?

A. I should prefer answering it in this way: It is notorious that they are exceedingly liable to abort in travelling to New York.

26 Q. But can you give us an approximate proportion?

A. Well, ten in a hundred is doubtless nearer.

27 Q. Within what period does life in the fœtus begin in a cow?

A. The cells begin to multiply at once on impregnation.

28 Q. At what time is the impregnated egg, in veterinary science, called a fœtus in a cow?

A. Within a month they begin to have the rudiments in the embryo.

29 Q. When does life begin to show itself?

A. Inferring from the time the fœtus begins to show life in woman and as the cow goes the same time with young, it would feel the first movement in about four and a half months.

30 Q. You state that if a cow is impregnated just before being put on board, travels over the Atlantic and fifteen hundred miles by rail, that at that time, without any serious shock, but by reason merely of the usual treatment, that animal would be likely to abort?

A. I did not say so.

31 Q. That with average treatment and average railroad travelling the beast so impregnated would land at its destination in that condition?

A. It would land in a condition more susceptible to abortion than if she had not taken this journey.

32 Q. If she had been so treated, and at a period in her course of travel she had been subject to such a shock as she would have received in a railroad collision, what would you expect?

770 A. I would expect that she would abort more readily than if she had not taken this journey.

33 Q. How long after that shock would you imagine abortion would take place?

(Objection.)

A. It might be a week or it might be at once.

34 Q. Would you consider such a shock in itself, aside from actual physical injury to the beast, sufficient to produce abortion?

(Objection.)

A. What shock do you mean? I would consider she was injured in the railroad collision.

35 Q. Would that shock, under the circumstances already described, in your opinion be sufficient to produce abortion, aside from physical injury?

(Objection.)

A. A shock caused by a sudden, abrupt stop of the car would strain the animal, as muscular effort elsewhere would. Muscular effort is recognized as a possible cause of abortion.

36 Q. Supposing the animal had not been injured physically in

such a collision, but had been subject to fright, would that be a cause of shock to the nervous system?

A. I think that answers itself.

37 Q. Would a pregnant beast at that point, having gone through the journey which we have described, undergoing collision which we have described, be liable to a nervous shock or would any nervous shock necessarily be the consequence of collision at that point in the beast's career?

A. I can hardly conceive that a collision could take place without more than a muscular strain. A car-load of cattle necessarily press each other more or less when the train is stopped without any collision.

38 Q. That crowded state is enough, in your opinion, to cause abortion?

A. In a collision this mutual compression must be somewhat greater and the results correspondingly greater.

771 39 Q. At what stage of the cow's pregnancy must she be in order to have such a shock necessarily produce abortion?

(Objection.)

A. The more advanced the pregnancy the more likely is mechanical violence to cause abortion.

40 Q. How far gone in the stage of pregnancy must a cow be in order to produce abortion by such a shock and strain as would be produced in a railroad collision?

(Objection.)

A. I do not think that I can answer that question categorically, because animals vary so much in their susceptibility. Some animals will abort without being subjected to even a railroad journey.

41 Q. At what time in pregnancy would such a collision produce in them abortion—the fourth or fifth month?

(Objection.)

A. That would depend upon the susceptibility of the animal.

42 Q. If the animal was only gone three months in pregnancy, having taken that journey we have described, would it, without any predisposition to abort, be caused, in your opinion, to abort?

A. Well, abortion is so common in cows taking a long railroad journey I cannot answer one way on the other.

43 Q. Would the majority of cows abort?

A. I think not.

44 Q. Do I understand that a shock at any period during pregnancy might produce abortion?

A. An injury at any period after copulation might produce abortion.

45 Q. Is fright a common cause of abortion?

A. Not very common in cows; it is in sheep.

46 Q. Supposing you knew that that beast had been frightened, and no other cause for abortion had interposed, would that, in your mind, be sufficient to have produced abortion in the beast? Have

you ever known in all your experience a case of abortion produced by fright?

A. I cannot recall any.

772 47 Q. Is fright known to be in the authorities or in your experience a cause of abortion?

A. In sheep it is known as a common cause of abortion.

48 Q. Is it known to be a cause in cows?

A. I cannot answer.

49 Q. May the same symptoms in cows that indicate poisoning by Paris green also indicate some other cause of disorder?

A. Yes, apart from analysis.

50 Q. Would the swallowing of Paris green in small quantities in itself produce abortion?

A. It depends on the amount. If there was an amount sufficient to produce inflammation of the bowels or stomach and much more of it caused ulceration of the stomach or bowels, it would be likely enough to produce abortion.

51 Q. Is it at all a common thing for beasts—cows—voluntarily to eat Paris green when they are in the midst of a plentiful pasture?

A. Yes; they are very liable to.

52 Q. Supposing a number of cows in the herd were pregnant and had been subject to a railroad collision and the handling they would receive in being unloaded from such a train, would not the necessarily handling and subsequent treatment and the shock altogether be sufficient, in your opinion, to produce a much larger number of abortions than if the cows had simply taken the usual railroad journey to that point?

(Objection.)

A. I did not say that the unloading would make any difference.

53 Q. What effect would that have upon them?

(Objection.)

A. It depends on how much injury was done to them.

54 Q. Is it not a most sensible thing to suppose that more abortions would occur?

A. My answer is that it would depend entirely upon the injury each individual animal sustained and the nature of the injury in each.

773 55 Q. Would you say that the percentage of aborted animals in an usual railroad journey is less or greater than the percentage of aborted animals in a herd in a train that had collided?

(Objection.)

A. According to the severity of the collision, there would be likely to be more injury to the animals.

56 Q. You have already answered that abortion from physical injury, internal or external, is not less likely to take place in Galloway cows than in any other kind. Why do you think so?

A. I do not know why it should be less likely to take place in the one rather than the other excepting so far as the Galloway cow

is an animal that is accustomed to life on the hills and has to do a good deal of work for its living, and that it is thereby kept in good physical condition and is likely to stand quite as much or more than a pampered animal of any other breed.

57 Q. Are polled Angus cows as hardy a breed as Galloway cows?

A. Not quite.

58 Q. Are either of the two breeds or both more liable to nervous disorder than other breeds or less liable?

A. I know of no facts to show that they are more or less.

59 Q. What experience have you had with both these breeds of cows?

A. I have been accustomed to see herds of them in Great Britain—of both kinds—and also here after importation, more particularly of late years.

60 Q. How extensive is your practice as veterinary surgeon now?

A. Well, I can hardly tell you.

61 Q. Is not your time principally devoted to your duties in Cornell University?

A. I deliver a lecture from eight to nine o'clock five days a week, and after nine I am at liberty to attend to practice.

62 Q. And do you devote your time to practice after that hour?

A. Yes; if I have any cases I attend to them.

63 Q. Do you know in what proportions abortions gener-
774 ally occur in herds?

A. They vary greatly according to the presence or absence of contagion.

64 Q. Your practice and experience in the United States has been almost exclusively in the Eastern States, has it not?

A. Yes; and in Europe. I go for the cattle commission in the West; I go West frequently; I have got quite a practice by letter and naturally come in contact with a great deal that is going on.

65 Q. What effect has exposure and cold upon pregnant cows?

A. I am not aware of any direct action, unless the cold thus induces freezing of the extremities or some internal disorder. Inasmuch as it is liable to produce other diseases it may produce abortion.

66 Q. What care is usually exercised with cows near delivery, as to food and attention?

A. It depends very much upon the breed.

67 Q. With these two breeds, please?

A. With the polled Angus breed it would be very important not to overfeed them prior to parturition—for a fortnight—and it is always well to keep the bowels open; drinking cold water to excess is positively injurious.

68 Q. Now as to other treatment?

A. Keep them quiet; they should have exercise, but it should not be violent; they should have good air, of course.

69 Q. Within what time after the presence of a cow that had aborted would its presence induce abortion in the rest of the herd?

A. Another animal might abort the same day; it might occur at

any time during the continuance of the abortion discharges from the first.

70 Q. How long after the presence of an aborted cow in the herd would it take to affect any of the rest of the herd, so that they would abort?

775 A. That would depend upon their susceptibility; it might be a day or it might be months.

71 Q. Are these breeds of cows—the Galloway and the polled Angus—more or less liable to miscarriage than other breeds?

A. I do not know of any data to prove that they are, more or less.

72 Q. Are they more or less sensitive to or affected injuriously by change of climate, of locality, or of transportation than other breeds?

A. The polled Angus, being the fatter, softer, more pampered race, is more susceptible than the Galloway.

73 Q. Are they both more or less susceptible than other breeds?

A. The polled Angus would come nearly on a par with the short horns. They would be behind the Ayeshires.

74 Q. Would you call these two breeds especially sensitive beasts?

A. No.

75 Q. What special circumstances of atmosphere, diet, &c., are favorable to the spread of abortion by sympathy?

A. A close and damp atmosphere, with a good deal of electric tension, favors decomposition and the strength of the odors and hence would favor abortions.

76 Q. Is abortion more communicable among cows than other animals?

A. Yes.

77 Q. If abortion is once introduced into the herd, is it not likely to continue beyond the first period for a year or several years afterwards?

A. Yes, unless the still unaffected animals are carefully separated.

78 Q. Is the aborted animal rendered less valuable and useful for the purposes of breeding after having once aborted than before?

A. Yes; until she can be made to carry a calf to full term.

79 Q. Is abortion more likely to happen when the injury is received during the earlier or latter part of gestation?

776 A. During the latter part.

80 Q. When are infectious abortions or abortions from other causes most likely to happen respectively in the life of a beast?

A. In the young and undeveloped, in the old and worn out, diseased, and run down; that covers the question pretty well.

81 Q. Are there periods during pregnancy during which shock, fright, or improper food or other known causes of abortion would not produce abortion?

A. I do not know of any such periods when it would be impossible to produce abortion, though abortion is more likely at one period than another.

82 Q. At what period?

A. The period corresponding to the heats—that is, the rot.

83 Q. If the shock or cause of abortion took place very early during pregnancy—say during the first three months—would it be apt to produce abortion in a healthy cow?

A. If the cause of abortion be injury, occurring in the first three months of pregnancy, it would be likely to cause abortion if the cause were violent enough.

84 Q. What are the consequences of abortion upon a beast as to retention of its milk?

A. Some will dry up.

85 Q. For how long a period?

A. Until the next calving. Some, and especially towards the end of natural gestation, will milk almost as abundantly as if calving had taken place in the natural way.

86 Q. What are the consequences of this kind of abortion—that is, by sympathy or by injury?

A. In some cases the loss of milk for that year; loss of progeny, as a matter of course; the liability to abort during the next gestation; the liability to affect other animals so as to cause them to abort.

777 87 Q. Is it not known by authority to be rare that abortion by sympathy occurs before the third or fourth month of gestation, and that it occurs more frequently in the fifth, sixth, or seventh month, or even later?

A. Yes; it occurs more frequently in the later months of gestation.

88 Q. You state, of course, that pregnant cows require much greater attention than those not pregnant?

A. A little mor- attention; yes.

89 Q. Is not hernia or rupture produced by contusions and strains such as might occur in a railroad collision?

A. Yes.

90 Q. Does such hernia make beasts less valuable for breeding purposes?

A. Yes.

91 Q. What effect has severe strain, jumping, or squeezing and contusions upon a pregnant cow?

A. They are liable to produce abortion.

92 Q. Do you say that you do not know the usual number of abortions in a herd?

A. They vary so greatly that I do not think I could give a statement.

93 Q. Is it not perfectly possible for cows of the breed of polled Angus and Galloway to come across the Atlantic in the ordinary way and to travel fifteen hundred miles by rail without aborting?

A. Yes; it is done constantly. The smaller the number, of course, the greater the likelihood.

94 Q. You have no personal interest in the event of this suit?

A. Not at all.

95 Q. You are not related to any of the parties?

A. To none of the parties.

96 Q. Have you ever seen cattle just after a railroad collision?

A. I do not recollect any instance of being on the spot when a railroad collision has taken place.

97 Q. From your experience in quarantine yards, is the treatment they receive very likely to produce abortion?

A. No.

778 98 Q. Do you know, from you own experience, what treatment cows generally receive on the railroad?

A. Most of the imported cows are carried in box cars and with only a limited number in the car; one side of the car is partly open, and they are reasonably well kept.

99 Q. And the treatment they usually receive, in your opinion, is not sufficient in itself to produce abortion?

A. Well, I would not say that exactly, because a long journey by rail is always dangerous to a pregnant animal.

100 Q. In itself, aside from special causes, such treatment as above described and the journey, would or would they not necessarily produce abortion?

A. Well, it would depend upon the susceptibility of the individual animal. Not necessarily.

101 Q. Does the eating of plants called horse-tails, sedges, or leaves of beet-root, ferns, lichens, moss, mushroom, &c., produce abortion?

A. Some of them do; a great many fungi, sedges, and horse-tails containing so much silica are liable to disorder the digestion, which may produce abortion.

102 Q. Are ex-itement or sudden surprise well-known causes of abortion?

A. In sheep, very much so; in cows, I have really not the facts to speak positively.

103 Q. May abortion produce prolapsus of the uterus and vagina and of the rectum?

A. Yes.

104 Q. Do great shocks and physical injury sometimes produce what is called complicated abortion?

A. Well, I do not know what is precisely meant by complicated abortion. Do you mean complicated with disease?

105 Q. Yes?

A. Yes; we have already been over that ground.

106 Q. At what time does a cow usually show signs of pregnancy visible to an ordinary observer?

A. Well, it depends on the oberver. Take two men who
779 are about cows all their lives and they will differ even at six or seven months.

107 Q. Is there not a predisposition to abortion in some cows?

A. Yes.

108 Q. Do you know what kind of cows especially?

A. No, except so far as the health of the cow is concerned.

109 Q. Not in any particular breed of cows?

A. No; heavy milkers abort more readily than those which are not heavy milkers.

110 Q. Within what time would abortion be likely to occur to a beast after injury in a collision?

A. It might occur the same day or it might occur within three weeks. It might really occur at any time if an injury became a source of continual suffering.

111 Q. Is abortion likely to be produced by a violent physical and nervous shock such as a beast might receive in a railroad collision—enough to produce abortion without actual physical injury to the beast?

A. It is a delicate question, that. The abortions that we see are almost invariably connected with some manifest physical injury.

112 Q. Would shaking up of the beast and nervous shock, such as would be received in a railroad collision, supposing the beast was well on towards delivery, be sufficient to produce abortion?

A. I could not well conceive of such a result—that is, abortion—without such a crowding of animals together and compression as would be liable to injure the womb—perhaps even to partially detach the fœtal membrane and thus cause abortion.

113 Q. Would not a railroad collision be sufficient, in your opinion, to produce all those results?

(Objection.)

A. It might or it might not.

114 Q. Would it not be likely to, Professor?

(Objection.)

780 A. It depends upon the collision.

115 Q. Is it possible for a railroad collision to produce abortion in a pregnant cow?

A. Yes.

Redirect Ex.

Redirect examination:

1 Q. How soon may abortion take place after the exposure of the pregnant cow to the influence of a cow that has aborted?

A. It may occur within a day and it may be longer.

2 Q. How long after the exposure of the pregnant cow to the influence of a cow that has aborted may abortion take place in a pregnant cow?

A. It may be delayed until that cow reaches the period at which she would be naturally in heat.

3 Q. How long could that period be after exposure?

A. About three weeks of the usual time, or a little over.

4 Q. May the first period be passed and abortion take place at the second?

A. Yes, it may.

5 Q. Is it common that it should be so postponed?

A. It is not common.

6 Q. Do you as a veterinary surgeon recognize any kind of shock unattended with physical injury as a probable cause of abortion?

A. Not in cattle.

7 Q. You have spoken of the pressing of cattle, one against the other, in a railroad collision. Has not the ordinary stopping and starting of trains this effect, so that it may result in abortion?

A. Undoubtedly.

8 Q. Is the constant jarring of a railway train liable to cause abortion in cattle transported several hundred miles by rail?

A. Yes.

9 Q. Is this recognized as an element of danger in all cases of transportation of pregnant cows by rail?

A. A very strong element of danger.

10 Q. If, in a railroad collision, pregnant cows have been
781 so injured or strained in any way as to produce abortion, would they, within a few days after the collision, show unmistakeable signs of injury?

A. I think in such a case a careful examination would detect some tenderness, in the region of the womb at least, if there was no other injury and some remaining discharge from the vulva.

11 Q. Do you consider it possible that twelve pregnant cows should receive physical injuries which would result in abortion without evident signs of such injuries appearing within a week after they were received should the abortions not occur within a week?

(Objection.)

A. No.

12 Q. Do abortions resulting from physical injury commonly occur within two weeks of the injury?

A. Yes.

13 Q. Do they more commonly occur within one week than after that time?

A. Yes.

14 Q. If abortion occurred in a herd at a time beyond one week after the cattle had been in a railroad collision would you think it probable that the collision was the provoking cause of the abortion without any apparent physical injury or suffering?

(Objection.)

A. It would be improbable, not impossible.

15 Q. If the abortion occurred two weeks after the collision would you or would you not think it highly improbable that the collision was the provoking cause?

A. I would think it highly improbable.

16 Q. Does the hardihood in the Galloway cattle result from heredity and the habits of life on the hills of the south and west of Scotland? If from birth cattle of this breed are subjected to precisely the same treatment as cattle of other breeds will they be more hardy?

A. It will remain for some generations, doubtless.

17 Q. Is this true, in a measure, of the polled Angus cattle?

782 A. Not so true.

18 Q. Is it true at all?

A. They are probably hardier than the short horns, but not much more so.

19 Q. You have said that in urgent cases you omitted your lecture?

A. O, yes.

20 Q. Do you as a rule give precedence to your practice?

A. No; I give precedence to my university duties.

21 Q. If it should become, then, a matter of giving up a lecture or of entirely abandoning a case would you give up the case?

A. It would depend upon the case. I have been compelled to be a good deal away from home.

22 Q. Are you in constant communication as to veterinary subjects with other veterinary surgeons in the United States?

A. More or less.

23 Q. With veterinary surgeons in England or Scotland?

A. To a certain extent; yes.

24 Q. How long a period of exposure to the influence of a cow which has aborted is required to cause abortion in a pregnant cow?

A. There is reason to believe that a very few minutes of exposure will produce it in some cases.

25 Q. Would you think that a pregnant cow was in danger of abortion by reason of an exposure of one minute to the direct influence of a cow that had aborted?

A. O, yes.

26 Q. How soon after impregnation is a cow subject to this influence exerted by a cow which has aborted?

A. She may abort at any period of gestation.

27 Q. What is the longest time after such exposure at which abortion might result?

A. I could hardly answer that.

28 Q. May it be after two or three minutes?

A. In such a case as we suppose it may be, of course.

29 Q. In cases in which abortion becomes prevalent in a herd what is the most common cause?

783 A. The most common cause is contagion or sympathy.

30 Q. What do you consider the most common cause of prevalence after contagion?

A. I would say sympathy in case of its general prevalence in the herd.

31 Q. How long after abortion are there evident signs of its having occurred?

A. Well, that again varies greatly. In our dairies in Central New York abortions often took place without the owner's knowledge until the cow took the bull again.

32 Q. Is abortion of the kind of which you speak, namely, that unattended with marked symptoms, more common in milch cows and heavy milkers than in others?

A. Yes.

33 Q. Are Galloways heavy milkers?

A. No.

34 Q. Are they commonly used as milch cows?
A. No.
35 Q. Are polled Anguses?
A. No.
36 Q. In these breeds does abortion ever occur without leaving unmistakeable signs in the cow?

(Objection.)

A. I do not see that we can make any distinction between these and other breeds in that respect as to the signs that are left after abortion; both animals, alike, will go to the bull, but the discharge in both may be transient.
37 Q. What are the signs which are sometimes not apparent in heavy milkers, but which are more frequently apparent in cows which are not heavy milkers?
A. Well, I do not know that I am able to say that. Cows in Central New York are more liable to abort without obvious signs than other cows elsewhere.
38 Q. Then, is abortion more frequent, and also less likely to be serious in its results, in heavy milkers than in other cows? Is it more frequent, or is it less likely to be serious?
A. More frequent; not less likely to be serious.
784 39 Q. Does abortion commonly affect injuriously the general condition of the cow?
A. Not always.
40 Q. Well, is it common?
A. In many cases it does. If you have many aborting a certain number will run down.
41 Q. Is the effect sometimes apparent in the generally unthrifty appearance of the cow?
A. It is sometimes.

Recross-Ex.

Recross-examination:

1 Q. Do you, as a veterinary surgeon, recognize the fact that simple fright, such as might be produced by the cattle meeting unfamiliar objects, such as the worrying of a dog or of a sudden surprise at times, might produce abortion?
A. I think that worrying by dogs is a very common cause of abortion.
2 Q. Would you call that cause a physical injury?
A. Yes; because they are driven violently.
3 Q. But supposing a cow was not driven violently; supposing she was worried by the dog so as to *to* be nervous and agitated?
A. If she was tied up so that she could not run she would still exert herself in some way.
4 Q. In stating, then, that fright is a cause of abortion you mean that the physical injuries directly consequent upon it are the immediate cause of the abortion, and that the fright is the primary cause?

(Objection.)

A. I attach the main importance to the physical injury.

5 Q. The exposure to draughts is a common cause of abortion?

A. Well, only as they produce diseases of the respiratory or other organs.

6 Q. Do nervous affections of any kind produce abortion?

A. Severe diseases of the nerve centres and painful nervous disorders would be especially likely to cause abortion.

7 Q. Within your experience, Professor, how large a number of cattle abort by reason of the railroad journey simply?

785 A. I have said already I cannot give exact numbers. There are a large number. It is such a notorious fact among cow dealers that the matter is very easily verified.

8 Q. Is it possible for a great number of the herd to go through the ordinary railroad journey, stoppages, &c., without abortion?

A. Yes.

9 Q. Even for very long distances?

A. Yes.

10 Q. When you say that after cows had been subject to collision on a railroad train they would show signs of abortion, do you mean that such signs would be apparent in any other way than by careful examination of each beast?

A. No. An animal that was bruised so as to injure the womb goes stiffly. She might have discharges from the vulva.

11 Q. Would it not be possible for a cow, after being injured in a railroad collision in such a manner as eventually to produce abortion, to go a great length of time without exhibiting any signs that would lead you to suppose that she had been so injured as to produce abortion, without a careful examination of the beast for that special purpose?

A. Yes; as far as the observation of the ordinary attendants was concerned, it might go some time without being suspected. A veterinary examination would detect it.

12 Q. Why would you consider that the collision was not the cause of abortion, unless the abortion occurred within two weeks after the collision?

A. Because abortion from injury is very likely to occur very early.

13 Q. It may, however, not occur until a number of weeks afterwards?

A. It may possibly not occur until even longer than that.

14 Q. How long after a pregnant cow has been subject to the influence of an aborted cow is it ordinarily before the pregnant cow exhibits any signs of infection by sympathy or contagion?

A. That is a little hard to answer, because if we put in the 786 element of contagion we find in all those in the herd, even in the same year, the number of abortions increase yearly. All do not necessarily abort in the same year, but it is difficult to say what time may elapse.

15 Q. How long after the exposure of a pregnant cow to the in-

fluence of an aborted cow is it before a pregnant cow exhibits signs of having been affected by the aborted cow?

A. I think this has been covered, because no signs are shown until the pregnant cow is about to abort, which may be certainly three weeks.

16 Q. May abortion by contagion exist in the herd purely from the presence of an aborted cow?

A. If that aborting cow carries the zymotic germ.

17 Q. How long after the exposure of a pregnant cow to the influence of an aborted cow that has the zymotic germ is it before the pregnant cow will generally exhibit signs of infection?

A. If that germ is lodged in the vagina, the signs will be usually shown within a month.

18 Q. Will it be shown much before the expiration of the month from the time of infection?

A. In some cases; yes.

19 Q. But not generally?

A. That depends upon the condition of the animal.

20 Q. Well, generally, how long is it before signs are exhibited?

A. Sometimes within a month; but if you take simple exposure in the herd, then it may be many months.

21 Q. After the first presence of a cow having the zymotic germ in the herd it may be months before any other member of the herd will show signs of having been affected?

A. Yes, and especially if at pasture.

22 Q. Is it not a common thing, known to veterinary science, that cows in a herd may have seeds of abortion in them without there being any visible signs for a number of weeks?

A. Yes.

787 23 Q. Do polled Angus cows or Galloway cows exhibit more quickly than any other breed the fact that they are so injured as to be likely to abort?

A. I do not know any reason why they should.

24 Q. Is it common with cows so affected as to finally abort to exhibit signs of unthriftiness or degeneration of their usual health?

A. Yes; if the abortion is the result of mechanical injury. If zymotic abortion, it is not necessarily so.

25 Q. Within what period, after having received an injury which will produce abortion, is it usual for the beasts to exhibit signs of running down and general depletion in their health?

A. An injury which will induce abortion will almost invariably be severe enough to cause decided loss of condition.

26 Q. Within what time?

A. From the time of the injury.

27 Q. What are the first signs exhibited of abortion in a cow that has been physically injured?

A. Well, the same signs as in other cases. They begin to have some little puffing of the vulva, a discharge of mucous, and afterwards blood from the vulva; sometimes what is called springing of the udder. The presence of milk in the udder, if that was not there before, and then labor pains.

28 Q. Are there any marked signs of degeneration in the physical condition of the beast?

A. Well, when an abortion is really imminent there is no time for that.

29 Q. When it is not imminent?

A. If she has received an injury that is likely to result in an abortion the signs will be according to the nature of the injury.

30 Q. Sometimes very perceptible and sometimes not?

A. Sometimes not so marked.

31 Q. Frequently marked?

A. Most frequently marked.

32 Q. How marked?

788 A. Well, one animal has its ribs broken, another has lost a leg, another has hernia by reason of rupture of the abdominal muscles. I might go on enumerating all the injuries, the surgical injuries of a serious nature.

33 Q. In case a cow has been so physically injured internally as to induce abortion, what external signs will she exhibit of being so injured?

A. Well, she will exhibit symptoms as varied as the internal organs that have been injured. If injured in the womb alone, she will show marked tenderness of the right side of the abdomen, stiffness in the hind limbs, with more or less fever, and sooner or later cessation of the fœtal movements, including the beats of the fœtal heart. Then will appear symptoms of imminent abortion.

34 Q. How long after the injury will those signs be perceptible?

A. They should appear at once and increase for twenty-four hours or longer. If a cow receives a blow, that produces a slight rupture of the liver. We have the usual signs of hipatitis with general fever, more or less high, with tenderness and flinching, particu-arly on percussion from the last ribs on the right side, partial suppression of urine, albuminous urine, costiveness, &c.

35 Q. Do you think at present of any prominent injury resulting from a railroad collision which may result in abortion that exhibits marked external visible signs within a short period after the injury?

A. Almost any external and almost any important internal organ may be seriously wounded by concussion or otherwise, resulting in inflammation with its manifest symptoms.

36 Q. Within what time after the injury will that symptom exhibit itself?

A. If at all serious, within twelve hours.

789 37 Q. Have you been called upon recently, Professor, to examine animals injured on the railroad?

A. Not recently.

38 Q. How late?

—. I cannot recall exactly; within two years, I think I am safe to say.

39 Q. What is the prominent authority on veterinary obstetrics?

A. The prominent English authority is Fleming.

40 Q. And the prominent American authority?
A. There is none.

JAMES LAW.

Deposition taken, reduced to writing, and by the witness subscribed and sworn to before me this 18th day of October, 1884.

[L. S.] JOHN B. PINE,
Notary Public, N. Y. C.

Testimony of John Caswell; Direct Exam.

JOHN CASWELL, sworn on the behalf of the defendant, testified as follows:

Direct examination by Mr. POLLARD:

Q. Give us your full name, Doctor.
A. John Caswell.
Q. Where do you reside, Doctor?
A. Chicago, Illinois.
Q. How long have you resided there?
A. Six years.
Q. What is your business—occupation?
A. Veterinary surgeon.
Q. Do you hold any official position?
A. Yes, sir.
Q. What is it?
A. State veterinary for Illinois.
Q. What are the duties of that office?
A. To look after contagious diseases—extirpate contagious diseases.
Q. How long have you been State veterinary?
A. A little over two years.
Q. Have you any other official position?
A. I was chief inspector of the bureau of animal industry, but that position is ended; the disease is extirpated; I was appointed for that.
Q. Did that apply to any particular diseases?
A. That was pleuro-pneumonia.
Q. How long were you acting in that capacity?
A. Since last October until the first of this month.
Q. Are you a practicing veterinary?
A. Yes, sir.
Q. How long have you been such practicing veterinary?
A. About 20 years.
Q. Where have you practiced?
A. In England and in this country.
Q. What was the character of your practice in England?
790 A. In England it was country practice; more especially amongst cattle and horses.
Q. More especially amongst cattle?
A. Yes, sir.

Q. Have you any institution in the treatment of animals in Chicago?

A. Yes.

Q. What is it?

A. Chicago veterinary college.

Q. What is that?

A. It is an institution for students—to teach students veterinary sciences.

Q. For instruction?

A. Yes, sir.

Q. Give us some idea of what your experience has been—how extensive in the treatment of diseases of cattle—cows.

A. Well, ever since I commenced practicing I have been, more or less, treating cattle; more in England than in this country; particularly amongst horses in this country—and cattle—except since I have been State veterinary.

Q. Have you in your practice been brought in contact with cases of abortion of cows?

A. Yes, sir.

Q. Are you a graduate of any college of veterinary?

A. Yes; the London college, England.

Q. Have you made the subject of abortion in cattle any special or particular study?

A. Well, not very particular study; not any more than other branches of the business.

Q. In your position which you occupy now as State veterinary are you brought in contact with a great many cattle?

A. Yes.

Q. Have you been during the last few years?

A. Yes, sir.

Q. I will get you to state, then, some of the principal causes of abortion in cattle.

A. The causes are numerous, if I have to go through them all.

Q. State the principal ones.

A. The principal one is, I suppose, the eating of ergotized plants and shales.

Q. What is that?

A. Grasses and shales. It is a fungus growth that attacks plants.

791 Q. Grows on plants?

A. Yes, sir; on all sorts of grasses—cereals, too.

Q. Is that something of common occurrence?

A. General occurrence in wet seasons more than dry seasons.

Q. Is it liable to occur everywhere? Is it confined to any locality?

A. Yes, sir; it is liable to occur everywhere.

Q. What other causes?

A. There are accidents of various kinds, of course, and sympathy and contagion.

Q. State whether or not that is a common cause, contagion or sympathy?

A. Yes; a common cause.

Q. Do they both produce the same thing, or is there a distinction?

A. I don't think it has been defined where one ends and the other begins. I don't think anybody can tell whether it is sympathy or contagion.

Q. In cases of either sympathy or contagion, is actual contact of the animal necessary with other animals?

A. Not absolutely necessary; no. They must be somewhere within hearing or seeing or smelling.

Q. Are you able to say with any degree of certainty how long after an animal has been exposed, say, to sympathetic or contagious abortion before a cow herself aborts?

A. I have known it occur in, I think, three minutes' time. I have known it something like 36 or 40 hours.

Q. What is the longest time?

A. That is hard to tell; maybe three or four weeks or five or six weeks.

Q. From ergotted feed, are you able to say about how long after?

A. It is hard to tell how long. It would depend altogether on how much they got at the first start. They may eat it for a month and not have sufficient to act on the genital organs. They may get a big dose, which will make them abort in 24 hours.

Q. How long might it be in an ordinary case before an
792 animal would abort who has sustained a physical injury sufficient to cause abortion?

A. That would depend on the extent of the injury. If it was directly over the uterus it would be likely to occur the same day or the next day.

Q. If it was severe enough to kill the calf or fœtus?

A. As a rule, the dam tries to get rid of the dead fœtus right off.

Q. How long would it be in an ordinary case—in an average case?

A. It might be as short a time as eight or nine hours, or perhaps even a shorter time than that.

Q. Is there any particular method of treatment that is adopted in the case of aborted animals?

A. After an animal has aborted, do you mean?

Q. Yes.

A. Yes; the animal should be isolated at once.

Q. Be what?

A. The animal should be at once taken away and isolated—put by itself—so it could not come with other animals pregnant.

Q. You mean from other animals?

A. Yes, sir; other animals that are pregnant; also all discharges that come from her should be removed—everything disinfected near her.

Q. Would another animal be likely to contract the disease from being put in the same stable where an animal had aborted?

A. Yes, sir; unless it had been thoroughly disinfected.

Q. Would it be a proper practice to put the same bull to a cow that had aborted and then to a healthy cow?

A. No, sir.

Q. Is that one of the sources of contagion?

A. Yes, sir; contagious abortion.

Q. It would be an imprudent course?

A. Yes, sir.

Q. Are these facts well established?

A. Yes, sir; amongst veterinarians, and most breeders that breed well-bred cattle do that.

Q. Have you heard the testimony in this case?

A. Yes.

Q. In relation to the accident?

A. Yes.

793 Q. I will ask you this question: Supposing that these cattle were shipped from Scotland on the 1st of July, arrived at Boston about the middle, in a very warm season of the year, put upon cars there, transported eight to ten miles to Waltham, in which transportation two of the animals died, one died there, and the accommodations there were inadequate——

Mr. GUITAR: We object to the question; it is a question for the jury whether the accommodations were inadequate or not; it is an open question whether the accommodations were adequate or not.

The COURT: The witness has heard what the testimony is; so have the jury.

Mr. POLLARD: I have no objection to asking him what his opinion is upon the testimony as he has heard it if that is the proper way. I suppose the proper way would be as I was putting it, assuming those facts.

The COURT: Inasmuch as this witness has sat here in the court-room during the trial—(to witness:) (You have been here during the whole trial, Doctor?)—I will allow him to give his opinion on the facts developed.

WITNESS: Yes, sir.

(By Mr. POLLARD:)

Q. I will ask you, upon the testimony as you have heard it in this trial, what, in your opinion, was the cause of the abortions in these cattle? State it in your own way.

A. I think that, while I am satisfied that this collision may have been the cause of hastening a good many of the abortions, in the first four or five I am of the opinion that they would have aborted anyway. Can I give my reasons why?

Q. Yes; go on and explain.

A. It is in evidence there were three abortions in Boston, two at least, and then another thing about it: Some of those cattle were so injured it is claimed that they died; they didn't abort; then there are some fifteen or sixteen have not recovered from the injuries that they received indirect. They didn't abort and are still bear-

794 ing calves, I understand, so it does look as though it was

either sympathetic or contagious abortion or both. There is another thing about it: There are some of them aborted pretty soon afterwards, so it might have been attributable to the accidents if there were no cause to look for, if there were no other. It is in evidence some kept aborting for three or four months, still they didn't show any bodily suffering from any injury or any disease. It seems that some of those cows that were put in the stable, and being fed to go to Kansas City for sale, aborted; they never showed any signs of injury or suffering. I don't see what other conclusion I would come to than that it must be either contagion or sympathy, if there is any difference between the two. I fail to find any difference. I don't think anybody has ever defined the difference. The germs of abortion are found in cattle that are supposed to be suffering from sympathetic abortion, and it has been proved that they are transferred to the vagina of the cow; having been brought in contact, they will produce abortion. There is no way to prove where the cow was; whether she aborted from sympathy or whether she aborted from contagion; whether the germs is the product of the abortion or whether it is the cause of the abortion.

Q. Where do you think that originated?

A. That is hard to tell.

Q. From this testimony?

A. It may have originated in Boston. It may have originated in Scotland.

Q. You say Boston?

A. Concord is near Boston. It seems all these cattle were supposed to be in calf when they left Scotland, and it is in evidence that the bulls used at Concord were also used to serve cows. All those cows with calf in Scotland, some must have aborted on the way, likely; I don't know. I can't tell where the contagion
795 commenced. It is impossible to tell where lots of those contagious diseases come from or where they may have got it. I don't know where it came from.

Q. In your practice is it or not a difficult thing in the majority of cases to determine what the origin of the abortion was—the cause?

A. Oh, yes.

Q. I will ask you what effect the feeding of high stimulating feed has upon pregnant cows.

A. It may be to predispose the cattle to abortion. Well, it is not well to feed animals that are pregnant very high anyway. It is not good practice, especially feed that — heating in its properties.

Q. Name some of the kinds of feed that would be imprudent for pregnant cows.

A. Any of the feed containing a good deal of starch or that generates a good deal of animal heat.

Q. How is it with corn in the ear or whole corn?

A. I would not consider that very good feed; for a day or two days it might be good for them, especially if they had something for a laxative; something to keep the bowels solid; feed that keeps them open is admirable.

Q. Is that not very stimulating?

A. It is very stimulating feed.

Q. Anything that binds the bowels—how is it with that?

A. That wouldn't have any bad effect if it didn't cause them to scour. If it adhered, then it would have a bad effect, of course.

Q. Is there any way of determining whether a cow that has been exposed is liable to abort, if she abort at all?

A. No, sir.

Q. What is the effect of an abortion on the cow as to her breeding qualities?

A. Well, that depends altogether on the treatment of the cow.

Q. Explain.

796 A. Well, if the cow is treated properly after an abortion—that is, kept away from the bull until her proper time for calving would come around, then put her to the bull—the chances would be in her favor as to getting in calf again. Of course she might abort all the same; she stands a good deal better chance than if bred right after having an abortion.

Q. How long ought she to run after an abortion before she is allowed to breed?

A. She ought to go until after her proper time would have come.

Q. Without regard to how long that would be?

A. If it was late—if the abortion were late, 7 or 8 months—it would be well to let her go longer; perhaps a month after.

Q. After she would have calved?

A. Yes, sir.

Q. Supposing proper treatment is observed, what would be the probable result on her breeding capacity?

A. Well, she might carry her calf; she might not. The rule in that case is if they abort at all they generally carry it a little longer than they did the previous one; perhaps, for instance, if she abort at six months, then she would carry it seven or eight months the next time; the next year she would probably carry it the full time.

Q. And bear it?

A. Yes, sir.

Q. What would be the result of her being allowed to take the bull at the first heat after she aborted?

A. Then the excitement of having the abortion has caused excitement in the genital organs; that keeps that excitement on; put the bull to her she wouldn't very likely conceive at all; she might get in calf; the chances are if she got in calf she would be in no condition to carry the calf; she might carry it; the chances would be against her.

Q. The chances would be that she would continue to abort?

A. She would continue to come in heat at whatever period.

797 Q. There has been some testimony as to several animals that died and were skinned, and the condition of those animals as to bruises, black and blue places under the skin, and clotted blood. Do you recollect hearing that testimony?

A. Yes, sir; I forget the time that had elapsed.

Q. How long would such evidences of injury continue after the injury?

A. The black or bloody appearance would pass away in ten days or two weeks, or else it would form an abscess in the part bruised.

Q. How would it pass away?

A. Become absorbed into the system.

Q. Would it leave any trace if that was done?

A. No, sir.

Q. It would be healed?

A. Yes, sir.

Q. Suppose it didn't do so, what would be the result?

A. It would form an abscess; there would be pus there.

Q. It would maturate?

A. Yes, sir.

Q. Clotted blood, how is it with bruises like that?

A. I can better explain on my own self; you can see it easier. For instance, if I got a bruise on my leg it would look red or purple, then become black. After awhile, if it got on all well, it would fade; whereas if it were bruised enough to form an abscess, the dead tissue would become separated from the live tissue, the healthy tissue would liquefy and become pus, form an abscess.

Q. Take these cases in the testimony. How long would such indications as that be possible after the injury that produced them?

A. Not longer than two weeks, unless an abscess formed.

Q. If these animals were found in that condition, say, six weeks or two months after their arrival at their destination, what would you attribute it to?

A. What condition do you mean?

Q. The condition that has been described here—black and blue, and bruises and clotted blood.

A. It must have been a recent injury.

Q. Could you attribute it to this collision?

798 A. No; not after that length of time.

Cross-Ex.

Cross-examination by Mr. GUITAR, for plaintiffs:

Q. You are a native of England, I believe?

A. Yes, sir.

Q. Studied your profession there?

A. Yes, sir.

Q. Graduated at the London Veterinary College?

A. Yes, sir.

Q. How long have you been in this country?

A. Since 1874.

Q. Practicing your profession since you have been here?

A. Yes, sir.

Q. You say there is what is known to veterinary surgery a form of abortion known as sympathetic or contagious abortion?

A. Yes, sir.

Q. The authorities in regard to that form of disease, as a rule, call it sympathetic abortion, do they not?

A. Not always.

Q. A majority of them don't subscribe to the theory of contagion, do they?

A. Yes, sir.

Q. Which?

A. Yes, sir.

Q. Tell me and tell the jury what is the difference between contagious and sympathetic abortion.

A. I said a moment ago I don't believe anybody could define where sympathy drops off and contagion begins.

Q. You and none of the profession, you say, you believe, are able to define the distinction?

A. Yes, sir.

Q. I want you to tell that jury upon what authority you state to the jury that there are two forms of abortion—one contagious and the other sympathetic.

A. I tell you, as I said before, I don't think anybody can tell where one begins & one ends or whether it is all one.

Q. You cannot tell the difference between the two forms?

A. You cannot tell whether the germ is the product which is known to produce abortion or is the product of abortion or is part of the cause of abortion. You know if the germ is present in an animal and that animal introduces it into the vagina of
799 another animal it produces abortion in that animal.

Q. Those who hold to the sympathetic theory insist that it is not the result of the introduction of any contagious germ in the vagina, don't they?

A. They do.

Q. It is the effect produced by the odor from the aborted cow, by seeing the fœtus, & so forth, upon the emotional nature of the cow?

A. That is so understood.

Q. Now, if you cannot tell the jury your reason for stating that they are different forms of the same disease, tell the jury the reasons why you take the position they are the same form or that one runs into the other.

A. Because we have not been able to define whether they are the same cause or not. Nobody seems to know. I recollect having a case of abortion, and I don't see how contagion would get there. It occurred in England. The case called to my attention was in 1869 on the farm of Mr. Harris, near Market Drayton. It was about the latter part of October, 1869, I was called to see an animal. After I had examined the animal and prescribed for it he says, "I just put away a little abortion. Come and look at it." He had a large barn, feeding about 20 or 30 bulls or steers. He says, "What do you call that—an abortion?" I says, "That is an abortion. You could see she has aborted." He says, "Yes." I says, "Ain't you afraid to bring her in? You will have trouble with your cows." "Oh, no; I guess not." It was within the third or fourth day after that he

sent for me again. He had two cows abort. I always thought it was sympathetic or contagious. There were 48 or 49 cows—I don't remember just the exact number—in the neighborhood of 50. 18 of those cows aborted in about 4 months.

Q. Did you conclude from what you saw there that it was sympathy and not contagion in those cases?

800 A. That is what I thought in the first place.

Q. Are not the books full of cases where there has been no actual mingling of the animals & abortion has followed?

A. I guess they are.

Q. You state, in your opinion, after hearing the testimony in this case, that the abortions were not produced by the collision at Nankin, but that the causes already existed—the disease was already present in the herd—and that it was only precipitated by the accident.

A. That is my opinion.

Q. I understand you to say you cannot tell whether that disease had its inception in Scotland or in Concord?

A. No; it is impossible.

Mr. GUITAR: Now, can you state to the jury what testimony you have outside of what you have stated? And state the reasons for that. I understand you that the testimony shows that all the cows were not in calf when they reached Boston?

A. Mr. Leonard's testimony was that the bull was used on some of the cows.

Q. I understand about that; on several of them. They were not all in calf. You assume they were not all in calf when they reached Boston. Your reason for stating to this jury you cannot tell that the disease may have had its inception in Scotland is the fact some of the cows when they reached Boston were not in calf?

A. That is one reason.

Q. That is one reason. You predicate your statement to the jury that the cause of these abortions had its inception in Scotland on the fact some of the cows reached Boston not in calf. Is that the fact?

A. I didn't say it had its inception in Scotland. I said it might have.

Q. You don't know where it had its origin?

A. No.

Q. You are giving simply an opinion? You are simply

801 a professional expert?

A. That is all.

Q. You have no personal knowledge about it?

A. No, sir; only what I have heard.

Q. You predicate that opinion that the abortions had their inception in Scotland upon the fact that some of those cows went to the bull after they had reached Boston, and your further inference they had aborted before reaching Boston, don't you?

A. I say they might have aborted before reaching Boston. I don't know whether they did or not.

Q. That is the inference on which you predicate it?

A. You can take it as an inference, if you like.

Q. I am not going to take it at all; the jury will take the testimony. Suppose the cows had not have gone to the bull, any of them, after they reached the city of Boston, what would you have supposed?

A. I would have supposed they were all in calf.

Q. Suppose none of them had been taken to the bull there, would you have inferred this disease could have its inception in Scotland?

A. It might have in that case, too, if they didn't take the bull; there might have been some there empty even if they didn't take the bull there.

Q. It is an inference; it is predicated on the inference that some of the cattle may have aborted before they reached Boston?

A. They may have aborted before any of these people saw them, for anything I know.

Q. You predicate your hypothetical conclusion upon that idea—that they may have aborted before?

A. That is what I said, I believe.

Q. You say it may have had its origin in Concord?

A. Yes, sir.

Q. Upon what facts do you predicate your hypothetical opinion, it may have had its origin in Concord?

A. Three cows aborted there, it seems.

802 Q. That 3 cows aborted there?

A. That is what I understood.

Q. The testimony shows, does it, that cows had aborted there, that abortion was occasioned by poison, doesn't it?

A. Two of them—the two last.

Q. And one not?

A. That was before they knew anything about poison—the first one.

Q. One of the cows that aborted at Concord, the testimony shows, hadn't taken poison at all?

A. According to the testimony as I understood it.

Q. That is the testimony?

A. As I understand it.

Q. The two others, about which there is a conflict of testimony, the testimony goes to show, if they aborted there at all, it was attributed to the effect of poison, doesn't it?

A. Yes; it may have been poison; it may have been the influence of the one which aborted before.

Q. I want to know whether or not this disease can be imparted where an abortion is occasioned by some physical cause & not from sympathy; whether that will communicate it?

A. Yes, sir.

Q. It will?

A. Yes, sir.

Q. I want to know the position which you take upon this question. An abortion occurs from physical cause; will that spread contagion?

A. That is something I told you was not proved yet—whether the germ is the product of the abortion or the cause of the abortion.

Q. Suppose the abortion is caused by a blow, and that cow is placed in contact with other cattle, will that produce sympathetic abortion in the other cattle?

A. If the germ is the product of the abortion it will, or it might be only from sympathy, if there is such a thing as that.

Q. You say if the germ is the product of the contagion it will?

803 A. I didn't say the product of the contagion; I said if it was the product of the abortion & not the cause of the abortion in the first animal.

Q. You can't say whether it is the one or the other.

A. No. Bacteria is formed in animals. We cannot say whether the bacteria of abortion is the product of abortion or the cause.

Q. I want to know if you ever heard of the bacteria of abortion being produced by a physical cause.

A. No; I never saw it at all; not myself.

Q. You predicate your opinion upon what you have read in books or what you have heard stated by others?

A. That is the——

Mr. GUITAR (speaking at this point): To come down to the wreck itself, I understand you to state that from the testimony and circumstances surrounding that wreck, as developed in this case, that you see no reason upon which you could come to the conclusion that that wreck had anything to do with producing these abortions as an original cause?

A. I think the way I put it was: in my opinion, the cause was there before and this served to hasten it.

Q. I understand you put it that way. I am putting it another way. I want to know whether, taking all the circumstances surrounding that wreck, the condition of the cattle anterior, at the time, and afterwards, whether you give it as your opinion to the jury that it is not probable from this testimony that any of those abortions were occasioned directly by that wreck.

A. I don't quite understand you.

Q. I will try to make you understand me. I want to know whether you give it as your opinion that that wreck produced any of these abortions as an original cause.

A. Injuries of all kinds produce abortions.

Q. We know injuries produce abortions; but were the injuries received, in your judgment, sufficient to have produced any

804 of the abortions?

A. Of course there was an accident there; it killed three or four of the animals; that was not the product of abortion. It is self-evident the cause was there before.

Q. We know it killed several of the animals; but, in your judgment, was the injury occasioned by that accident to any of these cows in that collision such as would produce abortion as an original cause?

A. I don't think it did in this instance, for this reason——

Mr. GUITAR: That is enough.

WITNESS: For those most injured didn't abort, and those three or four that died afterwards didn't abort at the wreck.

Q. That is the reason why you don't think——

WITNESS: That is the reason why I don't think——

Q. A very slight injury might produce an abortion sometimes, might it not, of a disabling character?

A. If it is directly on the uterus or fœtus.

Q. Or on any of the genital organs, might it not?

A. Yes; it would if it is severe, if on the external organs generally.

Q. Very serious injury may be inflicted to an animal in some parts of the body and yet it may not produce an abortion?

A. That is so, too.

Q. Doctor, you are here at the solicitation of the defendant in this case, are you not?

A. Yes, sir.

Q. When were you interviewed in regard to giving your testimony in this case?

A. I think it is nearly two years ago.

Q. By whom?

A. I don't recollect the gentleman's name. It was a lawyer wrote to me, in Chicago, to call at his office. He told me what he wanted me for.

Q. Did he take a memorandum of your testimony—what it would be?

A. No.

Q. Who took a memorandum?

A. Didn't any one.

Q. Have you had an interview with these gentlemen since
805 you have been there?

A. Yes, sir.

Q. Didn't they make a memorandum of what your testimony would be in the case?

A. I guess not.

Q. Different points?

A. I guess not. I don't think they did.

Q. Didn't they tell you what points they desired to examine you on?

A. I have been here disinterested.

Q. I understand that. Did they not make a memorandum of the points they wished to call your attention to and advised you of it?

A. They have not advised me anything. I don't know whether they have got any memorandum or not in the case. They will tell you if you ask them.

Q. I ask you. They are not on the stand.

A. They have not got any memorandum from me and I have not got any.

Q. They have not got anything from you? Two years ago you were informed by them they would call on you?

A. Yes, sir.

Q. At the instance of the company you came here to give your testimony?

A. Yes; to Kansas City. There was no trial.

Q. Did you ever see any of these cattle in question?

A. No.

Q. Never examined any of them?

A. No.

Q. Of your own knowledge you don't know anything about their condition, either before or after the wreck?

A. No, sir.

Q. I will ask you, in cases of sympathetic or contagious abortion, as you choose to term it, whether or not the majority of cases the abortion does not occur in the latter period of gestation.

A. It is liable to occur any time during gestation.

Q. Isn't it liable to occur as the period progresses towards its termination?

A. Towards the end of it?

Q. Yes.

A. It is more liable to occur then from accident than in the early part.

Q. Ain't it more liable to occur from sympathy towards the end of the period?

A. They occur sometimes.

Q. Do not statistics show that in the majority of cases it occurs between the sixth and the ninth month?

806 A. No; they do not; not contagious or sympathetic abortion.

Q. When do they occur in reference to the time?

A. About three to five months; or six months seems to be the time most abortions occur. That has been my experience.

Q. How many cows did you ever see that aborted?

A. I am sure I could not tell you.

Q. Give me an idea.

A. I suppose I have been called in at least a dozen times.

Q. Did you see the animal before the abortion or after?

A. After the abortion. They don't generally call me in unless something is the matter.

Q. Are there symptoms that indicate premature birth previous to it?

A. There are some.

Q. What are they?

A. The first thing you will notice the animals are dull, prehaps stupid; won't feel and act as the ought to feel and act; perhaps be a little feverish. There may be some discharges.

Q. You mean symptoms that immediately precede birth?

A. Not immediately. They may be within a month of birth, perhaps.

Q. I ask you as to sympathetic cases especially, whether there are not symptoms that precede abortion for a day and sometimes weeks before it occurs.

A. Very rarely.

Q. Do you tell me that in the majority of cases where it is referred to sympathetic causes that for days before the premature birth occurs there are not symptoms?

A. In some animals, yes, you have symptoms, but in the majority of cases they occur and nobody sees them occur.

Q. I don't ask you about what they don't see. The question is what they can see. Is there not inflammation of the udder?

A. Sometimes; sometimes tumafaction of the vulva; it depends a good deal on the period of the disease.

Q. Is there not an inflamed and swollen condition of the vagina?

A. Of the vulva; sometimes tumefaction.

807 Q. Is there not drooping in the croup?

A. Not very often.

Q. Stringy?

A. In contagious or sympathetic abortion it comes on so quickly, unless it is in the later stages of gestation; then it is somewhat stringy.

Q. You say in cases of sympathetic abortion the cause for the abortion may exist for weeks and even months before the abortion itself would occur?

A. Yes; in certain animals.

Q. Here is a cow affected from the sympathetic cause or contagion, as you choose to call it, it does not give birth to a calf for three months——

WITNESS: You can tell the causes there.

Q. You don't know, as a matter of fact, whether it is from physical or sympathetic causes? Here a cow—the cause exists—it would not give birth for three months; early in that period have you any evidence to show?

A. If you will please define the cause, I will tell you.

Q. I am speaking of symptoms, not the cause.

A. They would not give any symptoms if the cow didn't give birth to the calf for three months after.

Q. Not until a very short period before she gave birth?

A. Not to see it.

Mr. GUITAR: Dr., we will not trouble you any further.

Redirect Ex.

Redirect examination by Mr. POLLARD:

Q. In case of an abortion caused by physical injury is not a cow liable to give some signs of it prior to the abortion?

A. Signs of physical suffering?

Q. Or evidence of some kind?

A. There are cases where an animal may receive an injury, not very severe, and show no signs. In that case she would abort in a few days and show no signs to amount to anything. When an abortion is put off for, say, a couple of weeks the injury would keep getting worse. That animal would show worse symptoms—worse suffering.

Q. What would be the symptoms?

808 A. That would depend upon the injury; for instance, a broken leg or any external injury in the region of the chest, there might be pleurisy or pneumonia; it would be the direct cause of the abortion; it would supervene the producing cause. The disease which brought it about would be the exciting cause.

Q. I am asking you about a case where the abortion was caused only by the physical injury to a healthy cow.

A. In that case the symptoms would depend on the part injured.

Q. Suppose there was no external injury—that is, no visible external injury—would the cow show symptoms of her condition?

A. You would have to get at the symptoms to find the injury. She might show sufficient symptoms to indicate where the injury was; for instance, an injury to the liver. Perhaps for two or three days she might not show much until reaction set up, then she would show soreness on that side if you touched her.

Q. Supposing it was such an injury as would kill the fœtus or calf in her womb?

A. Then she would walk stiff behind; be very cautious in moving or turning around especially. There would be soreness on the right side of the abdomen.

Q. In such a case, where the calf is actually killed, how long would the abortion be after the injury that caused it?

A. That would depend on the extent of the injury.

Q. Sufficient to kill the fœtus?

A. The dam tries to get rid of the dead fœtus as quickly as possible.

Q. How long?

A. It might occur in not more than a few hours. If it didn't occur in a few hours——

Mr. POLLARD: Would it probably occur within a few hours?

A. Yes, sir.

(By Mr. GUITAR:)

Q. That would depend, Doctor, upon the stage of pregnancy?

A. Not necessarily, if it was a very small calf. It is pretty

809 hard to injure the uterus with a small calf, for it is protected.

Q. Until it reaches the conclusion of the period?

A. That is not necessary; it has got to be four months, for instance.

Q. I understand that an injury would not be so likely to precede an abortion in the earlier stages of pregnancy as in the latter?

A. No, sir.

Testimony of E. P. Wilson.

E. P. WILSON, sworn on the part of the defendant, testified as follows:

Direct examination by Mr. POLLARD:

Q. Where do you reside?

A. I reside in Olney, Illinois.

Q. State what connection, if any, you have had with cattle diseases—what office you fill.

A. I am a practical breeder of cattle; have been for eight years. I have given cattle and horse breeding my special care for six or eight years, and have bred, more or less, all my life.

Q. Have you made it a study—have you studied books?

A. Yes, sir.

Q. Different authorities?

A. I have studied the question of breeding since I have been specially engaged in it. When it was a mere incident I didn't give it much attention; since I have been specially engaged in it I have given the question of breeding more or less close study.

Q. State what, if any, official position you hold in relation to cattle.

A. I am at present a member of the board of live-stock commissioners of our State, and as such commissioner—as a member of that board—our board has charge of all dangerous, contagious diseases among domestic animals.

Q. How long have you been a member of that board?

A. I was appointed in November, 1886.

Q. And are so still?

A. I am on the board yet; yes.

Q. Have you given the question of abortion in cows any attention?

A. More or less. I have read upon the subject to a greater or less extent; not so thoroughly, I presume, as a veterinary surgeon or one who has made a profession of it. I have read it for
810 my own use and in my own breeding.

Q. Have you had any experience with abortions?

A. Yes, sir; I have had some experience with abortions in my own herd.

Q. You consider yourself posted on that subject?

A. I think I am. I, as a matter of course, am not so critically posted as a professional man. On the general facts of abortions I think I am as well qualified as——

Mr. POLLARD: What are the principal causes of them in cows?

A. They are so numerous I could not begin to mention them here. Professor Law in his deposition gives a great many causes of abortion, all of which are causes, yet none of them are usually the chief causes of abortion; as, for instance, ergot might be a cause—cattle eating grass that has ergot on it; it may be a mechanical injury; it may be brought on, as in this case, by an exciting journey; it may be brought on from sympathy; it may be brought on from contagion; it may be from stimulating feed; it may be from a great change in the habit of the animal's nature. I recall an abortion from a quarter of a mile drive through mud to a heifer. They are so numerous I could not pretend to give them. If I attempted to give a list probably I would leave half of the causes out.

Q. What effect does food have upon pregnant cows—different kinds of food?

A. That is very difficult to tell. For instance, you might be feeding two animals a good deal of oil; one of them might have an abortion and the other not; or you might be feeding corn, one might and the other not. If you are feeding oats and corn in a herd, some might abort and others might not. Of course, a breeder would not feed for the purpose of making abortions; he would feed to prevent it.

Q. Does high and stimulating feed have anything to — with it?

A. I recognize the fact that stimulating food is a cause of abortion; as, for instance, you take some cows that are heavy in
811 calf, you wouldn't go and feed them a heavy run of corn and oil-cake at that time for the purpose of running their bowels off or for getting them in high condition. It is recognized by all the breeders and all stockmen that to get animals in a high condition is a probable cause.

Q. What is the effect of abortion of a cow, as to her prospects of being a breeder for the future?

A. That would depend a good deal on the cow. There are some cows that are naturally prolific breeders; some are not. I have had experience myself in aborting cows. I have a short-horn cow that aborted, and it was the first case I ever had. I put her to the bull immediately, soon after the abortion; perhaps in three weeks or four weeks. In sixty or ninety days she aborted again. I then kept her from the bull until her time would have expired for dropping a calf. At the end of that time, she being in good physical condition, I put her to the bull. She has since given birth to four calves in the interim. She bred four calves succeeding that. I had another cow that aborted. I followed the same plan with her, and she has become a regular breeder. She never lost a calf since. I cannot say from that that established a rule that if you prevent the cow from going to the bull for a full term that thereupon she will become a breeder. These two did in my case. I have never had any trouble with them since.

Q. From your observation and reading, what would be your conclusion as to that?

A. My observation and experience and reading has been this: that if you take a heifer or a cow in the prime of life that from any cause aborts and you give her a full term before she is put to the bull, and the time of her full term expires and she is in condition, generally she will most likely prove a breeder after that.

Q. In this particular case, Mr. Wilson, have you heard all the testimony in relation to——

812 Ans. I am hard of hearing. I tried to hear all the evidence. I think I have.

Q. Is it your opinion you have heard the testimony?

A. Yes, sir; I think I have heard all the evidence given in this case.

Q. What, in your opinion, was the cause of the abortions in this herd of cattle?

Mr. GUITAR: We object to the question because it is predicated

upon the hypothesis that Mr. Wilson is a professional expert, which he says he is not.

Mr. POLLARD: He says he has made it a special subject of study?

The COURT: I think, General, that goes rather to the value to be attached to his opinion and not to the right to express it at all. I will let him express an opinion on the question.

Q. What, in your opinion, was the cause of the abortions in that herd of cattle from the beginning—the original cause? Give us your opinion and make such explanations as you think fit to the jury why you think so.

Mr. GUITAR: I object to any explanations.

The COURT: In the first place, Mr. Wilson, simply state your opinion as to the cause of the abortion.

Ans. I think the abortions here have been caused by what is known as sympathetic or contagious abortion in these cattle.

Q. Please give us your reasons for that.

Mr. GUITAR: I object to his reasons for the same cause.

The COURT: You may now state your reasons.

Ans. I never have seen a breeder nor read an author that didn't say that an abortion in one animal in a herd is liable to cause abortion in the others, and every breeder and every author I ever have talked with or read advises that in a case of single abortion the animal that has aborted should at once be isolated—that is, removed from the herd—and the premises they are confined in, the stable, should be disinfected. The animal, in fact, should be at once
813 removed from the enclosure or stable if possible. This is so generally the opinion that every tyro recognizes the fact that cows do abort by sympathy with others that have aborted. Their olfactories are very powerful, very sensitive. When one cow in a herd aborts some other is liable to abort at once—in twelve hours, twenty-four or thirty-six hours, or a week, two weeks, or three weeks.

The COURT: When you are stating your reasons, state the facts that have appeared in the testimony upon which you base the opinion that you have just expressed.

A. In the evidence here it appears that while the animals were at Concord a cow aborted. I heard nothing in the evidence to show she was isolated, but I understood that she ran with the rest of the herd from the beginning. Afterwards two others aborted that had eaten Paris green; I understood they had also run with the herd. From these causes—these chances—I draw the conclusion that others have followed their example and aborted by sympathy.

A JUROR: I would like to ask one question: Put in a lot of cows in a stable, cows that have stalls; standing there, one has a calf by natural birth, another aborts. Are they both alike?

A. One is a natural birth; that is not an abortion at all.

Q. The smell is just alike?

A. I don't know that the smell is just the same or not.

The JUROR: I have had cows in a stable; I have had some breed calves in one stall, bring calves in the natural way, and in another stall right there one would abort. I want to know whether there is any difference between the two.

A. Yes, sir; I would remove the cow that aborts from the cow that had a calf in a natural way; there is disease in one; in the other there is not.

Q. The smell is just the same?

A. It may be to you; I don't know whether it would be to the cow or not.

(By Mr. POLLARD:)

Q. How, if at all, do you think the cows were affected by the collision—by the accident?

814 Mr. GUITAR: I object to that altogether. Your honor decided he may give his testimony as an expert as to how these abortions occurred; he cannot give his professional opinion unless he was there and saw the wreck and witnessed the effect as to the condition of the cattle, for we have direct evidence as to the condition both before and afterwards.

The COURT: I will sustain the objection to the question. I have allowed him to state what in his opinion was the cause and the facts upon which he bases his opinion. That is as far as you are entitled to go.

Mr. POLLARD: They claim that these cows died in consequence of the collision; our testimony is simply to controvert that; that is why I put this question: What effect that collision would have, as it appears in the testimony.

The COURT: To express any opinion upon that subject he would have to know exactly how each cow was injured.

Mr. POLLARD: So far as the facts apply to all these cows, the jury have got to draw the inference from the facts as to the collision—all the facts connected with it; they have got to draw the conclusion whether the abortions were caused from that or something else.

The COURT: You can show, as you have shown by some testimony, how an abortion may be produced, what kind of violence may have that effect, but it is for the jury to determine from the testimony whether they received in this collision such blows as would produce that effect; they can determine that as well as an expert after they know from expert testimony what will produce an abortion. I think the objection is well made.

To which ruling of the court defendant then excepted.

Q. I will ask you to state your reasons why you think that the abortions were not produced by this collision.

Mr. GUITAR: He has stated his reasons; I object to the question.

The COURT: Yes; in the first place he was asked to state
815 what, in his opinion, produced them; then he was asked to state on what facts he based that opinion, and he has done so. It strikes me that ends the inquiry.

(By Mr. POLLARD:)

Q. Have you stated all the facts upon which you based your opinion as to the cause of this abortion?

A. Well, I could go on and answer the question you ask- me in the first place under that question, but if the court does not allow it I would not——

Q. There is no objection to this question.

A. No; I have not stated all the facts that would lead to the conclusion I arrived at.

Q. Go on and state the others to the jury.

A. I think any conclusion arrived at here should support all the abortions in the case as far as possible.

Mr. GUITAR: We don't want any argument.

The COURT: That is not proper. He is called as an expert to give his opinion as to what produced the abortions. He may state on what facts developed in the testimony he bases that opinion; beyond that point he cannot go.

(By Mr. POLLARD:)

Q. I want you to state all the facts upon which you base your opinion as to the cause of these abortions—all the facts upon which you base your opinion.

The COURT: And facts, Mr. Wilson, that have been developed by the proof in the case.

Ans. There should be, probably, some general cause of the abortions in this case. I have already said I think it was sympathetic abortion. Now, the fact that led me to that was that I could find no other cause in the evidence that would justify the abortions, in my opinion. We find there were some aborted on the cars while the cattle were coming from the place of injury—Nankin, I believe—to Chicago. If they had been the only abortions that took place in the drove—the entire shipment—I would have thought they
816 were caused by the injury, although the evidence don't show they were injured sufficient to cause abortion, but that would be a conclusion. There was one cow injured so badly that they didn't bring her. She had her calf all right. There were fifteen animals brought home in the Leonard cattle—the worst injured, I believe—and they had their calves all right. There were three animals that died belonging, perhaps, to Mr. Leonard. They had their calves all right. I came to the conclusion that it was not the injury that caused these cattle to loose their calves, or those that were the worst injured would be the ones that would abort. If the abortion was caused by physical injury it would follow in a very short time, but these animals continued to abort for days and weeks, and hence showed all the signs of abortion by sympathy or contagion. Now, if contagion existed among the cattle at Massachusetts—at Concord—this railroad journey and this collision would be an exciting cause for immediate abortion perhaps. Of course, if animals have contagious abortion among them the proper thing would be to separate

them and keep them separated, but under the circumstances that could not be done. They were put in cars and shipped, and possibly the shipment was an exciting cause of continued abortions.

Cross-Ex.

Cross-examination by Mr. GUITAR, for plaintiffs:

Q. You say that one of the facts from which you predicate your opinion is that there was an abortion between Concord and Nankin?

A. You mean the fact that this is contagious abortion?

Q. Yes.

A. No, sir; I say if this abortion that took place in the car——

Mr. GUITAR: Didn't you cite that one fact?

A. No, sir; I cited that as a fact—it was not caused by the collision—or else all the cattle injured would have aborted at that time.

Q. You do predicate your opinion as to the fact that the collision did not cause the abortions upon the fact that one of the cattle aborted between Concord and Nankin?

817 A. No; I say if that had been the only abortion I would have thought it was caused by the collision.

Q. But other abortions following that?

Ans. Others followed after they got to Missouri; two or four weeks after.

Q. You think it was sympathetic?

A. Yes, sir.

Mr. POLLARD: He didn't say——

Mr. GUITAR: I understood you to say that there was an abortion between Nankin and Concord.

A. No; there was no abortion between Nankin and Concord, that I know of from the evidence.

Q. Where was the abortion?

A. I understood from the evidence the abortion was between Nankin, where the accident happened, and Chicago.

Q. Between Nankin and Chicago?

A. That is my understanding. There was none between Nankin and Concord. I don't recollect any in the evidence.

Q. An abortion occurring the next day after the collision between Nankin and Chicago is one of the circumstances upon which you predicate your opinion that the collision didn't cause it?

A. No, sir. I will state what I said: I said any theory you establish should bear out all the abortions in this case. If the abortion between Nankin and Chicago had been the only abortion that took place in this herd, then I would think the abortions were caused by the collision, although I have not heard anything in the evidence as to how the animals were hurt.

Q. You have not heard any evidence?

A. Nothing describing how these animals were hurt; didn't describe whether a leg was broken—except that left there—except there was a collision and animals injured very severely. It didn't tell you, though——

Mr. GUITAR: You think in order to satisfy you that the collision

caused these abortions, you think all the — should have occurred between Nankin and Chicago?

A. No, sir; that collision happened on Sunday morning. They left there Monday morning and they got to Chicago Tuesday.

818 If the abortions were caused by the injury, the injury would have caused the abortions in from twelve to forty-eight hours.

Q. If the injury caused the disease which supervened, the disease, then, might cause the abortion?

A. It wouldn't happen so quick.

Q. I get your opinion to be this: In order to satisfy your mind that those abortions were occasioned by the collision they should have occurred within forty-eight hours after the accident?

A. I should think so.

Q. In your opinion?

A. 48 or 60 hours.

Q. You are not a professional veterinarian?

A. I told you I am not.

Q. You have raised some cattle?

A. I raised cattle.

Q. You have had two cases of abortion in your own cattle?

A. I had three.

Q. You have only testified to two.

A. Two in one; one in another.

Q. Those three proved to be successful breeders?

A. One animal aborted twice; the other once.

Q. You think it is no special injury to an animal for her to abort?

A. I didn't state that.

Q. As a breeder?

A. It is an injury. I stated that an animal that has aborted, I think, can be made a breeder by careful treatment. That is what I stated.

Q. What kind of cattle are you breeding?

A. Short horns.

Q. What would you be willing to give for a short-horn cow two years old, if you please, of the value of $500 in the market, if she had aborted her calf?

A. Two years old?

Q. And introduce her in your herd?

A. That is too young.

Q. Say three?

A. Make it two and a half.

Q. Say a two year and a half old heifer, worth $500; if she had aborted what would you give and be willing to introduce that heifer into your herd?

A. I have made it a rule never to buy anything but the best.

Q. Give me an answer to the question. What would you

819 be willing to give for that heifer?

A. You ask me what I would give, or what she would be worth; those are two different things. I don't think I should buy

her myself at all. I wouldn't buy a blind horse nor an aborted cow, nor anything that is diseased in any way,

Q. What would you be willing to give if she had aborted?

A. I wouldn't want to bring her on my place and spread disease in my cattle.

Q. You say that in your judgment high feeding is a prolific source of abortions?

A. High feeding, I think, is a prolific source of barren-ess.

Q. You know that in feeding one man feeds corn to his herd and another man feeds corn and oats; I ask you whether or not you regard the feeding of corn to animals pregnant a prolific source of abortion?

A. No, sir; not if feed with reason.

Q. You think the feeding of corn is rather a prolific source of abortions?

A. No; not if you feed them their rations.

Q. I mean where they don't feed their rations.

A. No; corn is not a prolific source. Indiscriminate feeding of corn and flaxseed is a cause of barrenness & abortions.

Q. How much is a reasonable feed of corn or any other feed?

A. It is healthy food.

Q. You stated in your testimony as one reason, I believe, that there were three abortions at Concord?

A. Yes, sir.

Q. You stated the further fact that those cattle were not isolated there from the rest of the herd?

A. I didn't hear any evidence to show that they were.

Q. Didn't catch any evidence that they were?

A. No, sir.

Q. You didn't hear the testimony that they were kept up in a barn and other animals belonging to the two herds of Estill and Leonards were turned out?

A. I heard no evidence to show that the cow that had fever and that Dr. Childs treated was kept up at all.

Q. You didn't?

A. No.

Q. You didn't know that she was in the barn?

A. She was in the barn.

820 Q. It was taken in the field for exercise?

A. Yes, sir.

Q. Did you hear that testimony?

A. Yes, sir.

Q. That was in the pasture, was it?

A. There were eight other cows in the barn.

Q. There were thirty other cows in the barn that had eaten poison?

A. When the Paris green was found there were 36 cows taken up. This was along with eight others in the barn; there was a barn on the other side. Those cows stayed in the barn, as far as I know.

Q. This cow died that aborted?

A. No, sir; she got well, although the evidence was the calf died.

Q. The calf died?

A. The cow got well; was turned out. If I am wrong——

Mr. GUITAR: I may be mistaken as to that. Were not other cattle kept in that barn during the time, the cattle that got the Paris green?

A. Now let me explain what I remember of the evidence. 36 cattle were taken up.

Q. And put in the barn?

A. Yes, sir; two barns.

Q. They were kept there during that time?

A. Yes, sir.

Q. Don't you know from the testimony that none of the Estill & Elliott herd were in the barn at all?

A. My recollection is the Estill & Elliott herd broke in with those other cattle afterwards, and afterwards they put a fence between them; I may be wrong about that; that is my remembrance.

Q. Now, don't you know that the animal that aborted on the train—the first animal that aborted on the train—belonged to the Estill and Elliott herd?

A. That is my remembrance of the testimony.

Q. Yet you reach the conclusion, in your judgment as an expert, that the abortions were from a sympathetic cause?

A. Are you going to admit I am an expert?

Q. I have to do it for this.

A. That is my idea.

Q. I have my own idea about your experience. That is your opinion?

A. Yes; that is my opinion.

821 Q. Suppose the cattle were isolated there and this abortion had have occurred, would you think that was a sufficient foundation for the opinion that the after abortions, when they came to Missouri—after reaching here—could be attributed to that?

A. I am confined in my testimony to the evidence, am I not?

Q. No; you are not confined in my cross-examination to any testimony at all.

A. I cannot testify to anything outside of the evidence?

Q. No.

A. Then, you cannot make an hypothesis outside of the evidence?

Q. Yes, I can. You are not as expert in the law as you are in veterinary surgery. These gentlemen will take care of you. I want to know of you if that abortion at Concord could have been, in your judgment, the source of these subsequent abortions on the train and after arriving in Missouri, providing there had been an isolation of these cattle at Concord?

A. If there had been isolation—if those barns had been occupied by the Leonard herd and there had been isolation of the Estill herd—I imagine the Estill herd wouldn't have had any abortions.

Mr. GUITAR: But——

WITNESS: Now let me go on. I answered I thought the Estill herd had aborted through sympathy; I did it on the proposition the cattle had been so closely confined together there could be no

isolation. Now, there were four hundred head in one 240-acre lot. I don't know how you would isolate them.

Q. There was a broad highway running between them.

A. Well, I didn't understand that from the evidence. I understood there was no fence between them, in the first place.

Q. We are not arguing the case. I want to know this: whether or not this abortion, which occurred on the train on the day after the collision, in your judgment, might not have been the source of the subsequent abortions?

A. If there had been—let me answer the question—I will try and answer it as fairly as I can.

Mr. GUITAR: It demands a categorical answer; then you
822 can give your reason.

A. If there had been contagious abortion in the herd before, yes; if there had been I would think it was a mere continuation of the contagion.

Q. Were those cases that you had in your own herd cases of sympathetic abortion?

A. No, sir; I was very careful that no sympathetic abortion should occur, for I isolated it at once from the other cows to keep them from contagion. This cow I had just bought; I bought it at a sale in calf. It may have been the shipment on the cars that caused the abortion. I should not think that, because it was a month or two months after it came home it aborted; but it aborted. I could not tell the reason; it just aborted.

Q. You think that you can tell by the examination of an animal—by the fœtus—when an abortion occurs, whether it has been the result of a sympathetic cause or physical violence?

A. No, I could not; I am not a veterinary surgeon. I could reason upon the question.

Q. I ask you now whether, in your judgment, you could tell whether it would be produced by one cause or the other?

A. I would know there was an abortion if the cow had her back broke; I could see she had her back broke in connection with it.

Q. You could not tell by examining the fœtus or discharge or calf of the animal whether it had been produced by physical cause or sympathetic cause or contagion?

A. Well, a man, except he has a microscope, could not find the germ. I never found it; I never expect to; I never expect to get that far into the science.

Q. You have never got that far into the science?

A. No; never expect to.

Q. Notwithstanding you are an expert?

A. You are playing hot and cold on the expert business.

Q. You heard the facts as detailed by witnesses in regard
823 to the character of the collision.

A. Yes, sir.

Q. And in regard to the manner in which those cattle were found after the collision. Do I understand you to state that the physical injury sustained by those cattle there was or was not sufficient to produce the abortion itself?

A. I must be governed by the facts.

Q. I am limiting you to the facts?

A. I say no; I am going to make an explanation. If the physical injuries cause the abortions, those that were worst injured would be the ones that ought to abort. As I understand it, those that were the worst injured are not the ones that aborted; the evidence was, as far as the injuries, that one-tenth of those injured didn't abort.

Q. Isn't it true that is owing to the character of the injury, and the part of the body of the animal that was injured?

A. There might be an internal injury you or I could see, and that might cause abortion. There is no evidence of it.

Q. You don't think that the effects of the collision were such as to produce any injury of that sort?

A. I cannot say that there was not, I cannot say that there was; but the effect of the collision ought to have passed off in a reasonable time.

Q. You think that a cow that sustains physical injury, either from a blow or from slipping or falling on the ice, from being gored by another animal, from being jammed in any way whatever, that of necessity the abortions must ensue within 48 hours?

A. Well, or 60; along there. If the blow didn't itself affect the fœtus.

Q. I am not talking about the effect on the fœtus. I am speaking of the effect in their own bodies.

A. If the blow didn't affect the fœtus, the blow would not cause abortion. You may have your rib or a leg broken; pleurisy may set in. The blow didn't cause the abortion there long after the accident.

824 Q. Suppose the kidneys were injured seriously?

A. That might affect the constitution of the cow, and the cow and the calf abort in consequence.

Q. Suppose the stomach is affected?

A. The blow would not be the original cause; it would be collateral.

Q. The blow would not be the cause; it would be the collateral cause?

A. The blow only sets up some action in nature which causes barrenness in consequence.

Q. Therefore any injury that might be sustained by an animal, either to her stomach or kidneys or brain, that would affect the circulation, that would affect the functions of her urinary organs, in your judgment, might not be the producing cause of an abortion which might not occur within 48 hours?

A. Oh, yes.

Q. Might be a week?

A. Set up a disease and the disease cause the abortion.

Q. And that disease cause the abortion, and it might be even weeks before the disease would progress so as to produce abortion?

A. I should think, though, where that happened the animal would die.

Q. The animal might or might not die, might it not, and still abortion ensue?

A. Might not die; it might not die; probably would.

Q. Anything that affects the digestive functions or urinary functions or congenital organs is likely to affect the fœtus, isn't it?

A. Anything that affects the congenital organs would. Bright's disease is not an abortion at all.

Q. Might not abort at all?

A. Yes, sir.

Q. It might have an abortion?

A. She might abort from other reasons.

Q. I am talking about that disease.

A. I don't know; some affection of the kidneys could affect the uterus.

Q. You don't know an affection of the kidneys is prolific?

A. There might be an affection of the kidneys that would
825 affect the uterus; there might be an affection of the kidneys that would not affect the uterus.

Q. That might or not?

A. Yes, sir.

Q. You don't undertake to tell this jury that injuries might not have been received by these cattle in that collision which might set up diseases in the organism of the cattle which could have produced abortion weeks after, do you?

A. Oh, it might happen that way.

Redirect Ex.

Redirect examination by Mr. POLLARD:

Q. I understood you to state, in answer to Mr. Guitar, that disease might be contracted or something be transmitted from car to car in the train?

A. I didn't state that. I can conceive it could be. It could be transmitted from car to car by smell as well as across the fence or across the road or across the ditch. I don't know how far contagion could be transmitted that way. I know the safe thing is always to be on the safe side in such things.

Mr. WERNER: This (showing advertisement in Breeders' Gazette of October 4th, 1883) is admitted as being inserted by one of the plaintiffs?

Mr. WILLIAMS: Yes.

Mr. POLLARD: I will offer the shipping contract for the Estill cattle, which was made at Boston, under which they were shipped.

Mr. WILLIAMS: We object for the reasons that this is a suit under the common-law liability of carriers. The rule is, where suit is brought on common-law liability, if they propose to avail themselves of the special contract they must set it up in the pleadings. That is the first objection to it. Second, even though the contract were pleaded, the ground of our action is negligence of the car-

rier, & they could not by a special contract exempt themselves from liability. Further than that, the contract itself does not pretend to exempt them from any liability. There is a memorandum on the back of it which we say don't bind us. For these three reasons we say it is not competent. It is not plead. They could not exempt themselves from liability, even if the contract so stated, for their own regligence, and the contract is not with this road; that
826 only applies over the Fitchburg road.

The COURT: For what purpose do you offer it?

Mr. POLLARD: I offer it for the purpose of showing that there was no contract with our road. The contract was made there, and that we are simply intermediate carriers.

The COURT: Two of the objections made are certainly good. I don't know but what the third objection is well taken.

Mr. POLLARD: I would like to ask Mr. Estill a question.

Q. If you contracted for the Leonard cattle?

Mr. ESTILL: Mr. Leonard made the contract for both cattle.

Q. I want to ask whether you received from the agent, whoever he was, a contract similar to that for the Leonard cattle.

A. Not as I know of.

Q. You don't know anything about that?

A. If there is such a contract it might have been delivered to Mr. Cunningham. I don't know anything about it.

Mr. POLLARD (to Leverett Leonard): Mr. Leonard, did you make the contract at Boston?

Mr. LEVERETT LEONARD: I made a verbal contract with the agent at so much a car, so much a car to carry the cattle to Chicago; an express contract with the agent — Chicago.

Q. Was it with the same party?

A. I remember a man named Cochrane was there. It was Mr. Green I contracted with. I would say those contracts were verbal with the agent. I was attending actively to the loading of the cattle in the cars with Dr. Rose.

Q. Who was this gentleman?

A. This is the station agent. I didn't make the contract with the station agent to carry the cattle. This station agent was a mere clerk.

Q. Did you make it with the same party Mr. Estill made his?

A. We made it together. I probably made the contract for the whole herd of cattle. They were shipped by one train.

Q. For you and Estills?

A. And for the Estills?

Q. Was it made with the Fitchburg Railroad Company?

827 A. It was made with the gentleman by the name of Green, who represented this line west. There were several lines vieing for our cattle. The Lake Shore was one road that applied for the shipment.

Q. You shipped on the Fitchburg road?

A. They all started from Boston on the Fitchburg road.

Q. Are you able to say whether you received any shipping bill?

A. I don't think I ever had one.

Q. Or a printed bill of lading?

A. No; I never had a bill in my possession. I was attending to the shipping of the cattle; never saw one of the bills, to my knowledge; don't remember anything of the kind. I didn't go with the cattle. The train pulled out immediately. After they were loaded I didn't have time to go over to the hotel and back to the station before the train was gone.

Q. All you say is you made a contract with the Fitchburg road to carry them to Chicago?

A. I made a contract with Mr. Green, who represented a line of roads to Chicago which started on the Fitchburg road.

Mr. POLLARD: We offer this. I understand it is excluded.

The COURT: Yes; the objection to it is sustained.

To which ruling of the court defendant at the time excepted.

The following is a copy of the paper just referred to:

Stock Receipt.

"(Original.)

"Fitchburg Railroad Company.

"Stock receipt.

"BOSTON, *Sept.* 12, 1883.

"Received of W. R. Estill:

"Five cars live stock.

"Value, —.

"To be transported to Estill, Mo.

"This contract and the responsibilities of the parties hereto is limited and controlled by the rules and regulations printed upon the back of this receipt, as also by the terms of the R. R. companies' printed tariffs of freight; and it is also understood that this corporation assumes no liabiity beyond the end of its own line, and that so far as its acts as agent for other parties participating in the joint transit aforesaid said parties are separately liable.

"J. R. HARTWELL,

828 "*Station Agent,*

"By COCHRANE."

(In the margin:) "For conditions of receiving and responsibility see back of this receipt."

"Conditions of receiving and responsibility.

"Owners are to load, unload, and feed at their own risk and expense and assume all risk of damage that animals may cause to each other or themselves and all damage in consequence of their breaking from the cars. No risk will be assumed by the railroad companies nor damage allowed unless specially agreed to when the animals are received and an additional price paid.

"One person will be allowed to pass free when accompanying his stock to take care of it and paying the price for not less than half a car, and in no case will he be allowed to ride free on the passenger trains."

Counsel for defendant then read the advertisement before referred to, the same reading as follows:

Advertisement from Breeders' Gazette.

(From the Breeders' Gazette of the issue of October 4th, 1883.)

"Black but comely.—Over eight hundred head of Scotch polled cattle—polled Angus and Galloways—imported this season by Leonard Bros., Mt. Leonard, Missouri; Charles E. Leonard, Bell Air, Mo., and H. H. Leonard, Blackburn, Missouri; selected and imported by the proprietors from the most noted herds of Scotland. Shipment of three hundred head recently released from quarantine now ready for inspection. Rare bargains at private sale. Unequalled opportunity for selection. We are prepared to show highly bred animals, both Angus and Galloways, which we do not believe can be surpassed on either continent. Come and see them."

Mr. WERNER: That is on page 471, Breeders' Gazette, October 4th, 1883.

Counsel for defendant offers in evidence reports of certain
829 sales in Kansas City in November, 1883, found in the following issues of the Breeders' Gazette: November 8th, 1883, page 637, vol. IV; November 15th, 1883, page 674, and possibly subsequent pages.

Mr. WERNER: Page 637 contains a report of sale of Galloway, Aberdeen, Angus by Charles E. Leonard; various sales noted separately, giving the names and numbers of the animals. In this particular sale 44 animals sold for $16,865, the average selling price being $383 of that lot of cows and bulls. Another sale by the Leonards, found on page 674, shows a sale of 25 animals for $8,520, or $355 average price. A sale of Estill & Elliott, on the same page, shows 27 animals sold for $12,420; average price, $474.50.

The sales above referred to are as follows:

Reports of Sales of Cattle.

Report of sales at Kansas City in November, 1883.

Sale of Galloways and Aberdeen-Angus by Chas. E. and L. Leonard.

Cows.

Imp. Bluebell of Tarbreoch (4258), calved March, 1880; W. G. Anderson, Ochiltree, Kan.	$325
Imp. Kate of Drumwhirn (6571), calved 1880; George Omrod, Elmwood, Mo.	315

Imp. Lizzie 2d of Lochenkit (4390), calved Jan. 17, 1880; Geo. W. Cracraft, Kingman, Kan. $400

Imp. Carlisle (5573), calved February, 1880; T. J. Wallace, Bunceton, Mo. 395

Imp. Adeline 2d of Birkshaw (6321), calved 1880; Geo. Omrod 380

Imp. Young Stately of Tinwald Downs (vol. IV.), calved March 28, 1881; J. S. Goodrich, Goodrich, Kan. 500

Imp. Maid of Cleughheads (5847), calved March, 1880; John Null, Stella, Neb. 405

Imp. Augusta of Tinwald Downs (6079), calved March, 1881; same 400

830 Imp. Miss Lucy 2d of Castlemilk (vol. IV), calved 1881; R. B. Hudson, Carrollton, Mo. 460

Imp. Tarn Beauty (6936), calved 1880; W. G. Anderson 395

Imp. Constance of Orchardton (6702), calved 1880; John Null 360

Imp. Merry Maid (6941), calved 1880; Geo. Omrod 300

Imp. Brown Bess (6075), calved Jan. 28, 1881; same 385

Imp. Beatrice Grey (6076), calved Jan. 21, 1881; J. J. Mansur, Normon, Mo. 415

Imp. Granton (6300), calved April, 1881; W. G. Anderson 350

Imp. Mall 3d of Farthingjames (6482), calved April, 1881; Geo. Omrod 385

Imp. Dolly 3d of Tarbreoch (4598), calved May, 1881; Rob't Stanley, Carrollton, Mo. 360

Imp. Gallowhill (6297), calved April, 1881; J. G. Mansur 350

Imp. Beauty 2d of Rigghead (6983), calved 1881; same 390

Imp. Maggie of Halliday Hill (5987), calved March, 1881; R. P. Glenn, Columbia, Mo. 400

Imp. Jessie of Bardarroch (5407), calved April, 1880; Geo. Omrod 320

Imp. Emma 4th of Glenrie (4553), calved Feb. 17, 1881; H. H. Harris, Marshall, Mo. 365

Imp. Jess of Dromore (5531), calved 1880; Jas. H. Wagoner, Pleasant Hill, Mo. 360

Imp. Mary Ann of Gall (6308), calved March, 1881; A. B. Mathews, Kansas City, Mo. 400

831 Imp. Tarn Witch (6937), calved 1881; Geo. Omrod 300

Imp. Louisa of Auchenhay (5474), calved March, 1881; Carter Bros., Oxford Mills, Neb. 300

Imp. Kirsty of Troquhain (5323), calved 1881; J. O. Stark, Louisiana, Mo. 295

Imp. Brockloch 2d (6308), calved April 22, 1881; same 285

Imp. Princess of Priesthaugh (4042), calved Jan. 15, 1881; Geo. Omrod 445

Imp. Barbara of Crossdykes (6301), calved March, 1881; J. O. Stark 295

Imp. Lily of Ravenscleugh (4450), calved April, 1881; same 295

Imp. Cowslip of Miunydow (4093), calved Jan. 12, 1881; Geo. Omrod $310
Imp. Denty 3d of Farthingjames (6483), calved March, 1881; same 300
Imp. Belle of Auchenhay (5473), calved Feb'y, 1881; J. Stark 270
Imp. Beauty 2d of Meikle Whitriggs (6290), calved April, 1881; Geo. Omrod 300
Imp. Victrix of Closeburn (4523), calved March 11, 1882; H. H. Metcalf, River Bend, Kans. 395

Bulls.

Imp. Lord William (1561), calved Jan. 2, 1880; T. H. Hickman, Columbia, Mo. 715
Imp. Auctioneer (1572), calved Jan. 21, 1880; Rob't Baas, Wilder, Kan. 600
Imp. Joe of Midtown (1624), calved Feb. 10, 1880; Colonel A. Speed, Boonville, Mo. 400
832 Imp. Northcote (2416), calved September, 1880; E. H. Simons, Pleasant Green, Mo. 400
Imp. What's Wanted (1707), calved March 18, 1881; B. G. Walker, Pleasant Green, Mo. 550
Imp. Ossian (1680), calved March 31, 1881; F. McHardy, Emporia, Kan. 400
Imp. Compensation (1726), calved March 28, 1881; Geo. Omrod 330
Imp. Bonnie Scotland (1802), calved Jan. 17, 1882; Thrall Bros., Hamilton, Kan. 575

44 animals sold for $16,865; average, $383.30.

W. H. & A. Leonard's Galloways.

Cows and heifers.

Fancy 4th of Thurstonfield, 2 yrs.; Theo. Bates, Bates City, Mo. $310
Lady Anderson of Gall., 2 yrs.; D. A. Hancock, Blackburn, Mo. 325
Bonnie Bess 3d of Rockhall Mains, 2 yrs.; W. S. Speed, Boonville, Mo. 320
Ann of Cleughheads, 2 yrs.; R. P. Glenn, Columbia, Mo. 320
Crolly, 2 yrs.; A. B. Mathews 300
Beauty of Pedderhill, 4 yrs.; J. S. Kirk, White Sulphur Springs, M. T. 300
Elspeth of Pedderhill, 4 yrs.; F. McHardy 350
Moorland Maid, 2 yrs.; J. S. Kirk 300
Lady Dacre 2d, 2 yrs.; F. McHardy 345
833 Marion of Drumhumphry, 2 yrs.; M. R. Warner, Gunnison, Colo. 310
Meg 3d of Tarbreach, 2 yrs.; D. A. Hancock 325
Crawston, 2 yrs.; M. R. Warner 305

Charmer of Orchardton, 3 yrs.; Theo. Bates	$285
Bell 3d of Tarbreach, 2 yrs.; J. H. Ray, Carrollton, Mo.	330
Mary 2d of Slacks, 3 yrs.; D. A. Hancock	280
The Twin, 2 yrs.; Theo. Bates	325
Claret of Orchardton, 3 yrs.; W. S. Speed	280
Clara of Orchardton, 3 yrs.; Theo. Bates	295
Fair Ellen, 2 yrs.; H. W. Ely, Monroe, Mo.	310

Bulls.

Manager, 18 mos.; Geo. Ormod	260
The Member, or Elrig, 18 mos.; D. A. Hancock	270
Stirring Times, 22 mos.; Thrall Bros., Hamilton, Kan	600
Baldy of Blackcraig, 16 mos.; W. H. Ely	275
Viscount Loftus, 2 yrs. (Angus); B. F. Doran, Bunceton, Mo.	675
Jingo, 4 yrs. (Angus); D. A. Hancock	525

19 cows sold for $5,915; average, $311.
6 bulls " 2,605; " 434.
25 animals sold for 8,520; " 355.

Estill & Elliott's Aberdeen-Angus.

Cows and heifers.

Frou-Frou, 18 mos.; W. K. Goodwin & Son, Beloit, Kan.	$480
Flounce, 3 yrs.; J. F. True, Newman, Kan.	460
Bonnie Heather, 17 mos.; H. H. Davidson, Wellington, Kan.	425
Lady Florence, 2 yrs.; J. M. Jones, Plattsburg, Mo.	415
Flora of Drum, 3 yrs.; R. T. Atkins, Parkville, Mo.	325
Harriet 4th of Balfnig, 1 yr.; L. R. Ketchum, Snake Valley, Utah	500
Caroline of Wardhouse, 2 yrs.; R. D. Hudson, Carrollton, Mo.	470
Haythron of Wardhouse, 2 yrs.; R. T. Atkins	510
Ophelia of Shempston, 20 mos.; Carter Bros.	440
Lady Macbeth, 19 mos.; W. R. Goodwin & Son	360
834 Witch of Yohan 2d, 11 mos.; L. R. Ketchum	300
Festive, 2 yrs.; R. T. Kingsbury, Estill, Mo.	490
Beauty of Candyglerach, 2 yrs.; Goodwin & Son	576
Sunshine of Badds, 2 yrs.; J. H. Ray, Carrollton, Mo.	405
Susie 3d of Crathes, 18 mos.; J. H. Brill, Pittsboro', Ind.	355
Maggie 4th, 20 mos. (not eligible); Colonel T. Estill, Estill, Mo.	200
Lady Mary 2d, 11 mos.; Thos. Harrison, Auxvasse, Mo.	425
Heatherbell of Farmton, 19 mos.; R. T. Kingsbury	805
Mayflower of Badds, 19 mos.; R. T. Atkins	400

Bulls.

Black Rod, 21 mos.; Thos. Harrison, Auxvasse, Mo.	825
Fugleman, 8 mos.; A. B. Matthews	390
Larkspur, 11 mos.; B. Nance, Glasgow, Mo.	325
Reginald, 2 yrs.; W. F. Reed, Mexico, Mo.	480

Baron Duffus, 3 yrs.; R. T. Kingsbury	$950
Artist, 11 mos.; W. R. Warren, Gunnison, Col.	335
Collier, 11 mos.; Carter Bros.	365
Cash Boy, 11 mos.; S. S. Northern, Mexico, Mo.	410

19 cows and heifers sold for $8,340; average, $439.00.
8 bulls " 4,080; " 510.00.
27 animals " 12,420; " 474.50.

Here defendant rests.

Rebuttal—L. Leonard.

Testimony in rebuttal.

LEVERETT LEONARD, recalled on behalf of plaintiffs, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. You have some explanation to make about the name of one of the bulls?

A. Since the testimony I gave before my attention was called to the fact — a bull by the name of Northcote; I gave him as a bull that had never been off my farm. I hadn't referred to the name in three years. That bull was sold in Kansas City, a bull by that name; it was not that name; it was a bull named Wellington. It was a three-year-old bull, injured in the back. It never was taken off my farm until I sold it to an adjoining neighbor. He is still on that place. To the best of my recollection, I don't think he has been any further. I gave the name Northcote. It was not the proper name; that is all.

835

Q. State to the jury whether or not you had received the pedigrees of the cattle at the time that Mr. Baldwin and Mr. McCulloch and Mr. Geagan were at your place?

A. No, sir; we hadn't the pedigrees in our possession; they were all at Glasgow; we didn't receive them till just before the sale.

Q. How did it happen you didn't have them?

A. They were left there to be compiled in a catalogue by the editor of the Galloway herd book; it required a good deal to do, because the history and breeding of each animal had to be given in the catalogue.

Q. How about the Angus herd book?

A. The same way with the Angus cattle; they were compiled in Scotland, catalogued by the editor of that herd book.

Q. How many head of those cattle reached your place at Mount Leonard?

A. 299 head.

Q. Five died; that made 304. What became of the others?

A. There were three at Waltham——

Q. I want to know what became of the balance of them.

A. One was lost in driving from Concord to Waltham; got away in the woods. We never recovered it.

Mr. POLLARD: That has been testified to.

Q. Now, I want to call your attention to any statement you have made in regard to the cattle not looking like they had been in a wreck to Mr. Baldwin or Mr. McCulloch or Mr. Geagan. What did you say, if anything, about that?

A. I just know I never said that; I don't think I am that big fool.

Q. You didn't say that?

A. I never said such a thing as that; I cannot conceive that I ever said it at all. Of course it is hard——

Mr. WILLIAMS: State whether Mr. Manly J. Green was told
836 by you that cows had aborted from eating Paris green.

A. I could not have said such a thing; didn't know of it of my own knowledge; never heard such a thing.

Q. Did you say it?

A. I did not.

Q. Did you say it to Mr. Green or to anybody?

A. Never said it to anybody, for I never heard of such a thing.

Cross-Ex.

Cross-examination by Mr. POLLARD, for defendant:

Q. I don't exactly understand you about this bull explanation. Do you mean that you gave the wrong name to a bull that was injured?

A. Yes, sir.

Q. You gave the name Northcote?

A. Yes, sir.

Q. When it should have been something else?

A. Yes, sir.

Q. What kind of a bull was it?

A. It was a three-year-old bull.

Q. What is the correct name?

A. When I spoke of it I felt confident it was Northcote.

Q. I want to know the correct name.

A. His name was Wellington. I believe that was his name. At the same time, I have not referred to it for several years; it is a matter of recollection with me.

Q. Can you say now?

A. No, sir; I don't know as absolutely as I did three or four or five years ago.

Q. Are you sure now it was Wellington?

A. No, sir; I am not; I am not as positive as I was the other day it was Northcote.

Q. You are not sure that Northcote——

WITNESS: Yes; I am satisfied; because I know this bull was never off my farm; he was broken down; never was off there.

Q. Isn't it a fact since your testimony was given here you have ascertained that Northcote was sold at Kansas City?

A. Yes, sir. I stated in the beginning my attention was called to that fact.

Q. Now you change it to Wellington?

A. No; I don't change it positively. My testimony is we had sold a three-year-old bull injured; never taken off the farm till two or three years ago, when I sold him to a near neighbor.

837 Q. Did you give these gentlemen anything to indicate what these cattle were? Did you have the numbers and names of them or anything?

A. No, sir; I never saw a number or name. I knew from Mr. Cunningham, who was familiar with the cattle, the names of some of the finer animals, such as Lord William.

Q. Didn't you have the bills?

A. No, sir; I never saw any bills. I didn't buy these animals myself.

Q. Whoever did?

A. I never saw any such thing; I don't know any such thing was in existence. I don't believe in Scotland they make bills of sale as in Missouri. We never give bills here of cattle; I don't think they do.

Q. Did you sell any cattle before you got the pedigrees?

A. My recollection is we never sold an animal until those pedigrees came.

Q. When did they come?

A. They came previous to the Kansas City sale.

Q. How long before?

A. I know we were fearful they might not get here in time. I think only, probably, two or three weeks before the sale.

Q. Did you sell eleven head of cattle the day Baldwin was there?

A. No, sir; I never did.

Q. Did you sell them to Ormerod?

A. No, sir; I did not.

Q. Didn't you testify to that at the last trial?

A. No, sir; I think not.

Q. Were not eleven head of the Leonard cattle sold to Ormerod?

A. Eleven head of William's and Abiel's cattle were sold. I never sold any.

Q. I said of the Leonard cattle—whether any of the Leonard cattle were sold.

A. If you said that, I beg your pardon. I thought you asked if I sold any.

Q. I mean the Leonard cattle; I am speaking of pedigreed cattle. Do you give pedigrees of your individual cattle?

A. Yes, sir; always in making sales.

Q. You say you hadn't got the pedigrees at that time of your cattle?

A. As a matter of fact I had the pedigrees for none.

Q. For none of them?

838 A. For none of the Leonard cattle. You asked me if I had sold any previous to the arrival of the pedigrees. I had not. My brothers did.

Q. The pedigrees all came together?

A. Yes, sir; the came in the form of the catalogue that we present in this case. We never received them in any other form except that catalogue.

Q. Some were sold before the pedigrees came?

A. My brothers did; they informed me they sold some.

Q. Didn't you see the cattle go away?

A. No; I knew it from my brothers.

Q. You knew Ormerod was there?

A. Yes, sir; I know Ormerod well. I know he bought cattle—that is, had been told he bought them by my brothers.

Q. In relation to this statement of Mr. Baldwin, you say you didn't say what Mr. Baldwin said?

A. No; I never said any such thing.

Q. What did you say?

A. I could not say; I said a good many things.

Q. Did you say anything like that?

A. No, sir; nothing like it.

Q. You were insisting upon damages for —, were you not?

A. I don't know in particular what special damage I insisted upon; I don't remember now. The proposition was this, if you wish to know it——

Mr. POLLARD: No; I am not asking what your proposition was; I am asking if you were insisting on prospective damages.

A. No, sir; we never insisted on a settlement with Mr. Baldwin then. When he mentioned the amount we told him there was no——

Mr. POLLARD: In answer to that didn't you say you objected to the amount; that you thought you should have something for prospective damages?

A. No, sir; I made no such statement to Mr. Baldwin—never.

Q. And unless that was done a person would not suppose——

WITNESS: I made no such statement.

Q. Didn't you testify to that in the other trial?

A. No, sir.

Q. Didn't you admit you had made substantially that statement?

839 A. No.

Q. In relation to the statement you made to Mr. Green, did you not make this statement, that you were afraid your cattle would abort?

A. Yes, sir; I say to-day I was afraid at the time. I didn't know the effect of the poison.

Q. Is not that the statement Mr. Green made?

A. The question was asked Mr. Green if he stated we had had abortions. There is a difference between an abortion and a fear.

Q. You understand what my question is?

A. Precisely.

Q. What Mr. Green says?

A. I don't know what Mr. Green says.

Q. That you would get out of it well if your cattle didn't abort?

A. Yes, sir; I might have said that. The question was asked me if I told Mr. Green the cattle had aborted. I would like to have that settled.

Q. It is settled as far as you are concerned. You now say you made that statement. You concede you were apprehensive your cattle would abort after taking the Paris green.

A. I was apprehensive. I didn't know anything of the effect of that kind of poison. I never had a case of that kind before.

J. McLachlan.

JOHN MCLACHLAN, recalled, testified as follows:

Direct examination by Mr. COSGROVE:

Q. Were you at Concord during all the time these cattle remained there?

A. Yes, sir; all the time.

Q. Did the Estill & Elliott cattle and the Leonard cattle ever get together after eating the Paris green?

Mr. POLLARD: We object to the testimony, but you may answer.

Ans. No; they never did.

Cross-Ex.

Cross-examination by Mr. POLLARD, for defendant:

Q. How do you know?

A. Because I was with the cattle, taking care of them, feeding them three times a day.

Q. Day and night?

A. No; I was not with them all night.

840 Q. The Leonard cattle got Paris green?

A. Yes, sir.

Q. When was it?

A. I never saw them eating Paris green. I know that Paris green was found.

Q. You don't know how long they had been eating it when it was found?

A. No, sir; I don't know.

Q. Didn't find the Paris green until after the cattle were taken sick, and some of them very sick?

A. No, sir.

Q. Requiring treatment?

A. No, sir.

Q. You don't know how long it had been in the field?

A. It was reported to have been there for five years. I knew nothing about it. When this fence was built——

Q. I am not asking you about any fence. The cattle were in the pasture there after the Paris green was discovered?

A. Yes, sir.

Q. Now, were they in the same lots they were before?

A. Yes, sir; they were in the same lots; never changed.

Q. How many men were in attendance on those cattle altogether—the Leonards' and the Estill cattle?

A. Six men, I believe.

Q. Did you stay by them night and day?

A. No, sir.

Q. Didn't stay by them day and night?

A. No, sir.

Q. When the cattle were taken to the cars to be loaded, how were they taken from Concord—from the Tower farm to the railroad station to be loaded?

A. They were driven in four or five bunches. I don't remember just exactly how many. I think each bunch was driven according to the amount in the pasture. That is my recollection.

Q. That is, each lot was taken?

A. Taken out as it was, driven to the station, and each lot loaded separately; that is my impression.

Q. When they were being loaded were they driven into the same lots to be loaded on the cars?

A. They were driven into separate lots. That is my impression. I am not positive as to that—my impression.

Mr. POLLARD: If you don't recollect, I don't want you to state.

841 Ans. I don't remember.

Q. You don't remember?

A. No, sir.

Q. How long did it take you to load them?

A. It took from daylight in the morning till nearly dark at night.

Q. Were those cattle all there at the same time?

A. They were all at the station at the same time.

Q. How many yards did they have there?

A. I don't remember.

Q. Did they have more than one?

A. I don't remember.

Q. Why don't you remember that; didn't you see it?

A. Yes, sir; but I don't recollect whether there was more than one or not. It is my impression there was. I was going to give my impression; you stopped me.

Q. Were they all loaded through one chute?

A. No; they were not loaded through chutes at all, as I recollect.

Q. How?

A. They were loaded on the cars; there was a long platform, I suppose, three times as long as this building, and six or seven or ten cars at a time loaded.

Q. The cars came right up to the platform?

A. Up along the platform or flooring, standing out.

Q. The cattle were all loaded from that right into the cars?

A. Yes, sir.

Mr. POLLARD: That is all.

Mr. WILLIAMS: We ask the privilege of putting in the catalogues of shipment of the stock, the pedigrees.

Mr. POLLARD: We object to that on the ground they are not evidence.

The COURT: What are they offered for?

Mr. COSGROVE: To show the character of the breed of cattle.

Mr. POLLARD: They are simply printed books; they are no evidence of anything, not admissible for the purpose of proof.

The COURT: I think books of that kind purporting to give the ancestry of particular animals are mere hearsay. I think you will have to rely as to the ancestry of those cattle upon the testimony that is already in.

Mr. COSGROVE: There will be no objection to having them withdrawn?

842 The COURT: Of course not; they are your property.

Mr. POLLARD: There is nothing to withdraw.

This was all the evidence offered in the case on either side.

The court thereupon charged the jury as follows:

Charge to the Jury.

ESTILL & ELLIOTT
vs.
N. Y., L. E. & W. R'Y Co. } (No. 2023.)

and

LEONARD BROS.
vs.
SAME. } (No. 2024.)

THAYER, *Dist. Judge:*

GENTLEMEN OF THE JURY: In these cases there is no controversy over the fact that the respective plaintiffs delivered to the defendant certain cattle to be by it transported over its railroad and delivered at the terminus of its line to plaintiffs or to some connecting carrier.

Estill & Elliott appear to have delivered to the defendant 67 head of cattle, and Leonard Bros. appear to have delivered about 306 head of cattle.

Having received the cattle for the purpose of transportation, the defendant was bound to deliver the respective herds of cattle at the terminus of its line in as good condition as it received the same.

The complaint made is that defendant did not deliver the property in question at the terminus of its line in the condition that it received the same, and damages are claimed by the respective plaintiffs on that account.

It is practically admitted (and you may take it as a conceded fact) that while these two herds of cattle were in defendant's custody and in transit to their destination a collision occurred at

Nankin, Ohio, between two freight trains of the defendant
843 in which the cattle were being transported.

Now, the main and about the only question you will have to consider is the nature and extent of the injuries (if any) that were sustained by the cattle immediately in consequence of the collision.

When you have settled those questions you will have practically decided the case, and it is to be hoped that you will give these questions a careful and fair consideration and decide the same according to the evidence and rules of law, which I will now state for your guidance.

The law is that a common carrier like the defendant must pay the market value at the point of destination of all property entrusted to it for transportation which through its fault is lost or destroyed and is not delivered.

The law also is that if a carrier receives property for transportation and delivers it at the end of its route, bus, th-ough its fault, it is damaged and it fails to deliver it in the same condition as when received, it must pay the difference between the value of the property in its damaged condition at the point of destination and what the value of the property would have been at that place if delivered in the same condition as when it was received for transportation.

These are the general rules of law which must be applied in the assessment of the damages in the two cases now on trial.

The testimony tends to show that seven (7) head of Leonard Bros.' cattle (5 heifers and 2 bulls) were left at Nankin, Ohio, where the collision occurred (either killed or very badly hurt), and were never delivered at the point of destination or at the end of defendant's line.

If you find such to be the fact you will allow Leonard Bros. for those seven (7) head their market value as shown by the evidence at the point of destination in Saline county at the time they should have arrived.

844 The other damages claimed by Leonard Bros. may be conveniently divided into three classes.

In the first place, it is contended by Leonard Bros. that some of the cattle in question died after they reached the point of destination of injuries received in the collision at Nankin, Ohio. Abiel Leonard claims that 3 Galloway bulls died from such cause on his place.

Wm. H. Leonard claims that 3 heifers died from such cause on his farm, and Leverett Leonard says that 7 heifers died on his place after their arrival.

Now, if the evidence in the case satisfies you that any of the cattle did die, as stated by these witnesses, and that their death was the direct result of injuries sustained by the collision, then you will allow Leonard Bros. the market value in Saline county, as shown by the testimony, of the cattle that so died.

In the second place, it is claimed by Leonard Bros. that some of the other cattle received injuries of various kinds by the collision,

which did not terminate fatally, but, nevertheless, lessened the market value of the cattle so injured.

The class of injuries to which I now refer are strains, bruises, &c., which some of the cattle are said to have received.

The plaintiffs themselves and Dr. Glover and Judge Sparks have spoken of about 48 head altogether that are said to have received such injuries, including, no doubt, the 13 head that are said to have died.

Dr. Glover and Judge Sparks say that they found 25 or 30 head of injured cows and heifers and 5 or 6 injured bulls. The plaintiffs themselves make the number of injured bulls somewhat greater.

Abiel Leonard says he had 5 injured bulls in his portion of the herd. W. H. Leonard says he had 5 injured bulls in his herd. Leverett Leonard says that he had two bulls broken down in
845 the back and loins and 8 others that were unserviceable for a year or more. You will recall their evidence on this branch of the case.

I call your attention to this testimony for the purpose of saying that you should weigh it carefully and determine how many cattle, if any, received injuries by the collision of the character last described, and to what extent, if any, such injuries lessened their market value.

If you are satisfied by the evidence that any of the cattle received injuries such as strains, bruises, &c., which rendered them less valuable in the market at the point of destination than they would have been but for such injuries, then you may allow Leonard Bros. on that account such reasonable sum as will in your judgment, under all the evidence, make good such depreciation in value.

In the first place, it is claimed that certain cows and heifers that were with calf at the time of the collision in consequence of the collision lost their calves, and damages are claimed on that account.

There is evidence tending to show that about 94 or 95 head of the Leonard Bros.' cows lost their calves after the collision. Abiel Leonard says that 25 head lost their calves on his place; Wm. H. Leonard says that 27 head lost their calves on his place, and Leverett Leonard says that 43 head lost their calves on his farm.

With reference to this matter I will say that if Leonard Bros. have satisfied you by the evidence that any cows or heifers that were with calf when the collision occurred, as the direct result of that collision, lost their calves, and that such premature casting of their calves made the animals less valuable in the market than they would have been but for such loss, then they are entitled to recover the amount of the depreciation in value of any of the animals that so lost their calves. In this connection I instruct you, however, that the burden is on them to show not only that the cattle
846 sustained injuries, but to furnish the evidence as to the result of such injuries, and evidence that will enable you to assess the damages with reasonable accuracy.

Inasmuch as the cattle came into their possession shortly after the collision and they thereafter had the custody of the cattle, the rule

should be strictly enforced requiring them to show by satisfactory evidence the nature of the injuries received, the result of the injuries, and to what extent the market value was thereby impaired.

What I have said about the assessment of damages in the case of Leonard Bros. applies equally well in the case of Estill and Elliott. This difference is to be noted in the two cases, however.

None of the Estill and Elliott cattle appear to have been killed in the collision or to have subsequently died from injuries claimed to have been received in the collision.

You will have no claim of that kind to consider in the Estill and Elliott case.

In this case there is evidence tending to show specific injuries sustained by three bulls, one of which was injured in the testicles and two in the back or loins. W. N. Marshall and Benjamin E. Nance, who claim to have examined the Estill and Elliott cattle on their arrival, describe injuries to three bulls said to have been hurt in the back, loins, or testicles. They also say generally that from 10 to 15 cows and heifers were in very bad condition, and that one cow had lost an eye.

The plaintiffs themselves have given some testimony as to the condition of their herd on arrival at Estill. I call your attention to their testimony and ask you to consider it carefully.

In the Estill and Elliott case there is also evidence tending to show that 5 of Estill & Elliott's cows aborted their calves before they reached Estill; that 4 or 5 aborted their calves prior to
847 October 26, 1883, when a portion of the herd was taken to Kansas City, and two afterwards, making 11 or 12 in all.

With reference to these two kinds or species of injuries claimed to have been sustained by the Estill and Elliott cattle, I instruct you, as before, that if the evidence shows to your satisfaction that any of the animals sustained such injuries as the immediate result of the collision, and that the injuries so sustained lessened the market value of the stock so injured at the point of destination, then you will be authorized to allow Estill and Elliott such reasonable sum as in your opinion, under the evidence, will make good the depreciation in the value of any of the animals that you find to have been injured either by strains, bruises, &c., or by losing their calves.

Now, gentlemen, on the other side of this case you have the testimony of Mr. Baldwin, Mr. McCulloch, & Mr. Geagan, who claim to have examined the stock of Estill & Elliott & Leonard Bros. on the 27th and 28th days of Sept., '83 (11 and 12 days after the collision), with a view of ascertaining the injuries the stock had received.

I will direct your attention — the salient points of their testimony:

Mr. Baldwin says that among the Estill and Elliott cattle he found in a lot of 49 cows and calves one or two a little lame. In another lot, consisting of two bulls and one heifer, he found the heifer had a sore foot and the bulls were a little stiff, and that one other heifer was pointed out as having lost her calf.

McCullough's testimony with reference to the same herd is to the effect that he found one bull a little still, one (1) cow very stiff,

two other bulls (one in a stable and one in a pasture) both a little stiff, and one heifer with a sore foot.

In relation to the Leonard cattle, Mr. Baldwin says he found 3 stiff or lame heifers in a herd of 35 animals; one cow a little stiff in a herd of 29 cows and three that were said to have lost
848 their calves; one heifer also that was said to have lost her calf; one lame cow in a herd of 30 animals; one other cow in a herd of 32 animals that was said to have lost her calf; one bull in a herd of 17, lame in the fore leg; two other bulls in a herd of (9) animals, slightly injured, one lame or stiff and one with slight flesh wound; one other bull with hoofs swollen and wound in left hind leg.

Mr. McCullough's testimony as to the same herd (that is, with reference to the Leonard cattle) is to the following effect, namely, that he found 3 footsore heifers (one very sore) in a herd of 35 animals; 3 heifers said to have lost their calves in a herd of 29 head; 2 lame bulls in a herd of 5 animals, one footsore and one said to be not fit to serve cows; 2 lame cows in a herd of 26 cows and calves; 1 bull noticeably lame in a herd of 17 bulls, 1 bull with a slight wound in his thigh, and one other with a slight flesh wound.

All three of these witnesses say that the injuries to the two herds were not greater or different than might be expected to result from an ordinary long railroad journey, and that none of the injuries, in their judgment, were serious or liable to produce permanent disability.

From a summary of the evidence, as I have noted it, gentlemen, the testimony for the plaintiffs tends to show that about 48 animals in Leonard Bros.' herd (18 bulls and about 30 cows), after their arrival in Saline county, showed visible evidence of having been injured in the collision, whilst according to the evidence for defendant there were only 10 animals (5 bulls and 5 cows and heifers) which bore any visible marks of having been hurt.

In the Estill & Elliott case it appears from the plaintiffs' testimony that 3 bulls and from 10 to 15 cows sustained injuries, the injuries to the bulls being of a serious character, whilst accord-
849 ing to the testimony of defendant's witnesses only 4 animals (3 bulls and one cow) bore any evidences of injuries.

In the foregoing summary you will understand that I do not include cows or heifers that are said to have lost their calves. I refer only to animals that are said to have shown outward signs of injury.

In the light of the testimony, both for the plaintiffs and defendant, to which I have alluded, and in the light of any other testimony in the case which you may recall, and bearing in mind that the burden of proof is on the plaintiffs to show that the cattle in question received injuries and the extent and result of such injuries, you will have to determine the following important questions of fact, namely:

1st. How many cattle in each herd were injured in any manner, in consequence of the collision, to such extent as to lessen their market value at the point of destination?

2nd. How many of Leonard Bros.' cattle were killed or badly injured and left at Nankin, Ohio, in consequence of the collision, and what would have been the value of such cattle in Saline county, at the time they should have arrived, if they had been delivered in the condition in which the defendant received them?

3rd. How many of Leonard Bros.' cattle (if any) died of injuries received by the collision after they had been delivered to Leonard Bros., and what was the reasonable market value in Saline county of those cattle if they had arrived uninjured?

4th. How many animals in each herd lost their calves as the direct result of the collision, and to what extent did such loss of their calves lessen their market value at the point of destination?

5th. What number of cattle in each herd, besides those that are said to have died or lost calves, were otherwise injured by the collision, by strains, bruises, &c., so as to materially lessen their market value, and what was the amount of such depreciation in value?

850 To arrive at a just and intelligent verdict in these cases you will have to determine from the testimony each of the foregoing questions.

There are one or two other matters to which I will refer briefly. There is testimony in the case tending to show that in the last days of August, 1883, some of Leonard Bros.' cattle (and possibly some few of Estill & Elliott's cattle) found some Paris green and ate it at Concord, Mass.

The proof tends to show that 5 head of Leonard Bros.' cattle died of poison at Concord, and that about 30 other animals were made sick by it and were treated.

You will understand, of course, that if any of Leonard Bros.' cattle that are said to have died after they reached Saline county or if any of the cows in either herd that are said to have lost their calves died or lost calves in consequence of eating Paris green, then the railroad company is not responsible for the loss so occasioned.

There is also some testimony tending to show that when one or more cows in a herd give birth to calves prematurely, or abort, as the saying is, other cows in the same herd, unless separated from the cows that have aborted, are liable to cast their calves through sympathy or contagion, although they have themselves received no physical injury. This is a matter that requires your attention.

If it be true and you so find that cows will abort through sympathy or by contagion, then it was the plaintiffs' duty, if they could have done so, to have separated cows that had aborted from other pregnant cows, and to have done so with reasonable and ordinary diligence; and if plaintiffs failed to exercise reasonable and ordinary diligence and caution in that regard and any cows lost their calves in consequence of such negligence, then defendant is not

851 liable for such losses, as they were not the immediate and direct result of the collision, but the result of plaintiffs' neglect.

I will also say that defendant cannot be held liable for losses occasioned by premature birth of calves or by the death of stock if

such births or deaths were the result of overfeeding or the result of change of climate or fatigue or heat or of a long voyage on the ocean or by rail, or of all such causes combined.

In other words, gentlemen, the defendant is only liable for such premature births and deaths as are shown by the testimony to have been directly occasioned by injuries sustained in the collision.

The question as to what causes led some of the animals in the two herds to lose their calves or to die after arrival is a question which you may find some difficulty in solving, as in the nature of things these are questions that do not admit of solution by positive or direct proof.

I will only say that you must apply your best judgment and your experience to the solution of these questions, giving to all the testimony, including that of the experts, such weight as you think it fairly deserves.

If, upon a fair consideration of the subject, you deem the evidence insufficient to establish what was the cause of the abortions, then it will be your duty to disallow the plaintiffs' claims for damages on that account.

If the evidence establishes to your satisfaction that some of the abortions were the direct result of the collision, but leaves you undecided as to the cause of other abortions, then you should allow damages for such as you are satisfied were the result of the collision and disallow the plaintiffs' claims as to the residue.

When you have assessed the damages in each case you may compute interest on the damages in each case at — (6) per cent.
852 per annum from the time suit was brought—on November 21st, 1883, in the Estill case and Nov. 27, '83, in the Leonard case—to this date. I will further direct you to state in your verdict the amount of interest which you award in each case.

In conclusion, I ask you to give the cases a careful and unbiassed consideration. Consider the evidence in behalf of both parties in the same spirit of fairness that you would have it considered if you were yourselves personally interested as plaintiffs or defendants in the result of the suit.

Exceptions of Defendant.

Defendant's counsel duly took exception to the following ten paragraphs of the court's charge, to wit:

1st. "Having received the cattle for the purposes of transportation, the defendant was bound in law to deliver the respective herds of cattle at the terminus of its line in as good condition as it received the same."

To which the defendant then excepted.

2nd. "The law is that if a carrier receives property for transportation and delivers it at the end of its route, but, through its fault, it is damaged, and it fails to deliver it in the same condition as when received, it must pay the difference between the value of the property in its damaged condition at the point of destination and what the value of the property would have been at the place if delivered

in the same condition as when it was received for transportation. These are the general rules of law which must be applied in the assessment of damages in the two cases on trial."

To which ruling the defendant at the time excepted.

3rd. "The testimony tends to show that seven head of the Leonard Bros.' cattle—that is, five heifers and two bulls—were left at Nankin, Ohio, where the collision occurred, either killed or very badly hurt, and were never delivered at the point of destination or at the end of defendant's line. If you find such to be the fact, you will allow the Leonard Bros. for those seven head their market value
853 as shown by the evidence at the point of destination in Saline county at the time they should have arrived."

To which the defendant at the time excepted.

4th. "In the first place, it is contended by the Leonard brothers that some of the cattle in question died after they reached the point of destination of injuries received in the collision at Nankin, Ohio. Abiel Leonard claims that three Galloway bulls died from such cause on his farm. William H. Leonard claims that three heifers died from such cause on his farm, and Leverett Leonard says that seven heifers died on his place after their arrival. Now, if the evidence in the case satisfies you that any of the cattle did die as stated by these witnesses and that their death was the direct result of injuries sustained in the collision, then you will allow the Leonard brothers the market value in Saline county, as shown by the testimony, of the cattle that so died."

To the giving of which defendant at the time excepted.

5th. "In the second place, it is claimed by the Leonard brothers that some other cattle received injuries of various kinds by the collision, which did not terminate fatally, but, nevertheless, lessened the market value of the cattle so injured. The class of injuries to which I now refer are strains, bruises, etc., which some of the cattle are said to have received. The plaintiffs themselves and Dr. Glover and Judge Sparks have spoken generally of about forty-eight head that are said to have received injuries, including, no doubt, the thirteen head that are said to have afterwards died. Dr. Glover and Judge Sparks say that they found twenty-five or thirty head of injured cows and heifers among the Leonard cattle and five or six injured bulls. The plaintiffs themselves—that is, the Leonards—make the number of injured bulls somewhat greater. Abiel Leonard says that he had five injured bulls in his portion of the herd. William H. Leonard said that he had five injured bulls in his herd. Leverett Leonard said that he had two bulls broken down in the back and loins and eight others that were unserviceable for
854 a year or more. You will recall their testimony on this branch of the case. I call your attention to all of this testimony for the purpose of saying that you should weigh it very carefully and determine how many cattle, if any, received injuries by the collision of the character last described, and to what extent, if any, such injuries lessened their market value at the time of their arrival in Saline county. If you are satisfied by the evidence that any of the cattle received injuries, such as strains, bruises, etc., which

rendered them less valuable in the market at the point of destination than they would have been but for such injuries, then you will allow the Leonard brothers on that account such sum as in your judgment as reasonable men, under all the evidence, will make good such depreciation in their value."

To the giving of which defendant at the time excepted.

6th. "In the third place, it is claimed that certain cows and heifers that were with calf at the time of the collision lost their calves, and damages are claimed on that account. There is evidence tending to show that about 94 or 95 head of the Leonard brothers' cattle lost their calves after the collision. Abiel Leonard says 25 head lost their calves on his place. William H. Leonard says 27 head lost their calves on his place, and Leverett Leonard says that 43 head lost their calves on his farm. Now, with reference to this matter I will say that if the Leonard brothers have satisfied you by the evidence that any cows or heifers that were with calf when the collision occurred as the direct and immediate result of that collision lost their calves, and that such premature casting of their calves made the animals less valuable in the market than they would have been but for such loss of their calves, then they are entitled to recover the amount of depreciation in the value of any of the animals that so lost their calves."

To the giving of which defendant at the time excepted.

7th. Now, in the Estill and Elliott case there is evidence tending to show that five of the Estill and Elliott cows aborted their
855 calves before they reached Estill—that is, while they were in transit; that four or five cows aborted their calves prior to October 26, 1883, when the herd was taken to Kansas City, or part of it was taken there, and that two cows aborted their calves afterwards, making eleven, twelve, or perhaps thirteen cows in all in the Estill and Elliott herd that it is claimed aborted their calves.

Now, with reference to these two kinds or species of injuries claimed to have been sustained by the Estill and Elliott cattle, I instruct you the same as before: that if the evidence shows to your satisfaction that any of the animals sustained such injuries as the immediate result of the collision, and that the injuries so sustained lessened the market value of the stock so injured at the point of destination, then you will be authorized to allow Estill and Elliott such reasonable sum as in your opinion, under the evidence, will make good the depreciation in the value of any of the animals you find to have been injured, either by strains or bruises or by the premature casting of their calves.

To the giving of which the defendant at the time excepted.

8th. "Now, in the light of the testimony, both for the plaintiffs and for the defendants, to which I have just alluded, and in the light of any other testimony in the case which you recall, and bearing in mind that the burden of proof is on the plaintiff- to show that the cattle in question received injuries, and the result and extent of such injuries, you will have to determine the following important questions of fact, viz:

First. How many cattle in each herd were injured in any man-

ner, in consequence of the collision, to such an extent as to lessen their market value at the point of destination?

Second. How many of the Leonard brothers' cattle were killed or badly injured and left at Nankin, Ohio, in consequence of the collision and what would have been the value of such cattle in Saline county, at the time they should have arrived, if they
856 had been deliv— in the condition in which defendant received them?

Third. How many of the Leonard brothers' cattle, if any, died of injuries received in the collision after they had been delivered to the Leonard brothers, and what was the reasonable market value in Saline county of those cattle if they had arrived uninjured?

Fourth. How many animals in each herd lost their calves as the direct result of the collision, and to what extent did such loss of their calves lessen their market value at the point of destination? and—

Fifth. What number of cattle in each herd besides those that are said to have died or lost their calves or were otherwise injured by the collision, as by strains or bruises, so as to materially lessen their market value, and what was the amount of such depreciation in value?"

To the giving of which and to each one of the above five propositions the defendant at the time excepted.

9th. "The question as to what causes led some of the cattle in these two herds to lose their calves or to die after arrival in Saline county is a question which you may find some difficulty in solving, as in the nature of things these questions do not admit of solution by positive or direct proof. I can only say you must apply your best judgment and your experience to the solution of these questions, giving to all testimony, including that of the experts, such weight as you think it fairly deserves."

To the giving of which defendant at the time excepted.

10th. "When you have assessed the damages in each case, you may compute interest on the damages in each case at six per cent. per annum from the time the suits were brought (that is, November 21, 1883, in the Estill case, and November 27, 1883, in the Leonard case) to this day; and I will further direct you to state in
857 your verdict, separately, the amount of interest which you award or may award in each case."

To the giving of which defendant at the time excepted.

The defendant then asked the court to instruct as follows:

Instructions Asked by Defendant.

L. LEONARD *et al.* and ESTILL *et al.*
vs.
N. Y., L. E. & W. R. R. Co.

Instructions asked by def't.

1. For def't.—The jury are instructed that plaintiffs are only entitled to recover in this case such damages as they have shown by

the preponderance of the evidence were the natural and proximate consequence of the acts complained of in the petition, and that they are not entitled to recover any damages which could have been avoided or prevented by the plaintiffs by the exercise on their part of reasonable and proper care and prudence.

2. The jury are further instructed that before they can allow the plaintiffs damages on account of abortions, as claimed in the petition, they must be satisfied by a preponderance of the evidence that the abortions, if any, were caused directly by the alleged collision.

3. If the jury are satisfied by a preponderance of the evidence that the cows or heifers mentioned in the petition were with calf at the time of the collision alleged in the petition, and that some of them aborted their calves in consequence of injuries received in said collision, and that ordinary care and prudence required that such aborting cow or cows should be separated from the others pregnant cows of plaintiffs, and that this was not done, but such aborted cow or cows was or were allowed to be and remain with the other pregnant cows, by reason of which such other pregnant cows or some of them aborted their calves by contagion or sympathy, they should not allow damages for or on account of abortions thus caused by contagion or sympathy.

4. If the jury find that the plaintiffs' cows aborted their calves after the alleged collision, and that some or said abortions were caused by said collision, and that some were the result of poison, fatigue, heat, exhaustion, or any cause other than the collision,
858 and the jury are unable to determine from the evidence which cows and how many aborted in consequence of the collision and which from other causes, they should not allow damages on account of abortion from any cause.

5. The court instructs the jury that the burden is not upon the defendants to account for the abortions amongst cows and heifers of plaintiffs, if there were such abortions, but upon the plaintiffs to prove and establish by a preponderance of the evidence that such abortions were caused by the collision alleged in the petition, and if upon all the evidence the jury are not convinced that such abortions were caused by the injury, they should not allow damages for such abortion, although they may not be able to determine from the evidence what the real cause of such abortions was.

6. The court instructs the jury that unless the defendant knew that some of the cattle of plaintiffs were cows or heifers in calf plaintiffs are not entitled to recover for abortions, though they may have been caused by the wreck, as in that event damages on account of abortion could not have been in the contemplation of defendant at the time the cattle were received.

No. (6) refused. A. M. Thayer.

Which the court refused; to the action of the court in refusing said instruction defendant at the time excepted; and thereupon the jury gave their verdict against the defendant in both cases.

Whereupon defendant filed following motion for a new trial:

In the Circuit Court of the United States for the Central Division of the Western District of Missouri, April Term, 1888.

LEVERETT LEONARD *et al.*, Pl'ts'ffs,
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Def't,

859 & 860 and

W. R. ESTILL *et al.*, Pl'ts'ffs,
vs.
THE SAME DEFENDANT.

} Actions for Damages. Consolidated and Tried Together.

UNITED STATES OF AMERICA,
Central Division of the Western District of Missouri, } *ss:*

Motion for New Trial.

And now comes the said defendant and moves the court to set aside the verdicts in the above-entitled causes, and to grant a new trial in the same for the reason and upon the grounds following:

1. The court gave improper instructions to the jury.
2. The court refused proper instructions asked by defendant.
3. The court admitted improper and incompetent evidence offered by the plaintiffs.
4. The court made improper rulings on the evidence offered by the plaintiffs.
5. The court excluded from the jury proper and competent evidence offered by defendants.
6. The verdict is against the law and evidence.
7. The damages are excessive.
8. The court erred in overruling defendant's motion to quash the service of summons in the cases.

POLLARD & WERNER,
Att'ys for Def't.

But the court overruled the said motion and gave judgments upon the verdicts against the defendant; to which ruling of the court defendant then excepted; and inasmuch as the matters aforesaid do not appear of record the counsel for defendant presents this bill of exceptions and prays that the same may be signed and sealed by the court and made a part of the record in said cause, and it is done accordingly.

AMOS M. THAYER, *Dist. Judge.*

JNO. F. PHILIPS, *Dist. Judge.*

861 *Opinion of Judge Thayer on Motion for New Trial.*

In the Circuit Court of the United States for the Central Division of the Western District of Missouri.

ESTILL & ELLIOTT
vs.
NEW YORK, LAKE ERIE & WESTERN R. R. Co. } 2023.

LEONARD BROTHERS
vs.
SAME. } 2024.

Draffen & Williams and Cosgrove & Johnston and Mr. O. Guitar, attorneys for plaintiffs.

Pollard & Werner and James A. Buchanan, attorneys for defendant.

THAYER, *District Judge:*

These cases were tried together before me whilst holding the circuit court in the central division of the western district of Missouri, during the illness of the late Judge Krekel.

At my request Judge Phillips sat with me on the hearing of the motion for a new trial and subsequently examined the stenographer's report of the testimony. At my solicitation he has prepared and forwarded to me a written statement of his views touching the merits of the motion.

The views expressed by Judge Phillips (which are herewith submitted) are so comprehensive of the questions raised by the motion for a new trial and are so fully in accord with my own that I shall only supplement what he has said by a few additional observations, chiefly concerning the contention that the damages are excessive.

In the Estill & Elliot case the evidence tended to show that three bulls, valued at from $500 to $600 each, were so badly in-
862 jured that the three were eventually sold for about $200; that from ten to fifteen cows were bruised or maimed in various ways, so as to affect their market value, and that at least thirteen cows dropped their calves prematurely.

In the case of Leonard Bros. the evidence tended to show that seven head of cattle, valued at from $3,500 to $4,000, were either killed outright by the collision or were so badly hurt that they were abandoned at Nankin, Ohio, where the collision occurred; that thirteen head of cattle, worth on an average $500 each, or $6,500 in the aggregate, died of injuries received after their arrival in Missouri; that from 30 to 40 other animals (bulls and cows) sustained injuries of a character that materially depreciated their market value, and that ninety-five cows dropped their calves prematurely.

In both cases the evidence tended to show that the injured animals were worth, on the average, if unhurt, from $400 to $500 per head. The evidence further tended to show that if a cow from any

cause drops her calf prematurely it permanently lessens her market value as a breeder; that as a general rule an accident of that kind, if it becomes known, reduces the value of the animal to what she will sell for as beef; that a miscarriage destroys, in a great measure, the value of an animal as a breeder—at least, in the estimation of stock-raisers. It was further shown that as beef cattle the cows were not worth to exceed 30 or 40 dollars per head.

The jury may have found, and no doubt did find, that all of the foregoing facts (which the evidence conduced to show) were established by the testimony, and the damages may have been,
863 and probably were, assessed according to that view of the case.

If the jury, furthermore, found that the numerous abortions were the direct result of the collision and allowed damages on that account, as well as for the other losses and injuries above described, the amount of the verdict in each case is readily explained in a manner consistent with the facts as found by the jury.

In my judgment, therefore, the court cannot say that the verdicts are excessive and disturb them on that ground unless it be true that the rule adopted by the court to estimate the damages was erroneous or unless it be true that the evidence was insufficient to warrant the jury in holding the carrier liable for the abortions that occurred.

Both of these questions have been considered by Judge Phillips in the main decision with his usual care and ability. I shall only add a few additional suggestions.

Defendant's counsel apparently assumes that the fact that a cow lost its calf prematurely did not permanently lessen her market value; that such animals, or a large portion of them at least, by careful treatment would regain their capacity to breed regularly, as well as their original or normal value as breeders.

On this hypothesis defendant's counsel contend that plaintiffs should have been compelled to trace the subsequent history of each aborted cow, and that the measure of damages is what it may have cost to support and treat the animals during the period of disability plus the depreciation in value shown to exist at the date of the trial.

Whether any allowance ought to be made for the loss of
864 calves during the period of disability is not stated and apparently is not considered.

I apprehend, however, that that is an element of damage, and a very important one, that ought to be considered if defendant's theory of the measure of damages is adopted, inasmuch as the cattle were very valuable and the period of disability might extend over 18 months or 2 years, even if the animals eventually became regular breeders.

Now, in addition to the criticism made by Judge Phillips that defendant's method of estimating the damage is not in harmony with a well-established rule on the subject, and if adopted would necessarily embar-ass the trial of the cases with a multitude of collateral issues, I shall venture the criticism that the argument advanced in behalf of that method of computing the damages also overlooks or misconceives some important testimony produced at

the trial, which, in my judgment, has an important bearing on the question of the measure of damage that ought to have been applied.

Whilst it is true that there was some evidence that the market value of a cow intended to be used as a breeder is only temporarily affected by a miscarriage, and that her capacity to breed regularly may be restored by proper treatment, yet there was also very much testimony, and I may say that the weight of testimony was, that the value of a cow is permanently depreciated by losing her calf prematurely; that men engaged in stock-raising will not usually buy such animals for breeding purposes, because they are generally regarded as uncertain breeders at best.

If it be a fact that they are regarded by stock-raisers as uncertain breeders, and if it be true that the market value of an animal
865 is permanently depreciated by suffering a miscarriage, no substantial reason can be given why the damages allowed for the abortions said to have been occasioned by defendant's negligence should not be the amount of the depreciation in value estimated as of the date of the injury.

An injury of that sort which permanently depreciates the value of an animal is essentially like a physical injury, such as the loss of a limb or an eye, and I can conceive of no reason why there should be any difference in the method of assessing the damages.

I shall only add that defendant's counsel have cited no authority which on careful consideration appears to me to sustain the position which they have assumed touching the measure of damage.

If it had been shown to the satisfaction of the court that the kind of injuries now under consideration did not permanently affect the value of the animals as breeders, there would have been more apparent reason for applying the rule which defendant's counsel invokes; but even if the rule invoked had been applied and due allowance had been made for the cost of supporting the animals during the period of disability, as well as for calves lost in the meantime, it may well be doubted whether the rule would have operated to the advantage of the defendant.

But, be this as it may, the testimony produced at the trial did not, in my opinion, warrant a departure from the ordinary rule.

I confess that I entertained some doubt when the trial of these cases was concluded whether the evidence as a whole was sufficient
866 to support a finding that the carrier was responsible for all of the abortions. The question as to what caused such accidents in large numbers was one of more than ordinary difficulty, inasmuch as it was not susceptible of accurate solution, but depended largely on inferences to be drawn from established facts, with respect to which inferences intelligent persons might well differ.

Moreover, the question was one of those which a jury is quite as likely to decide rightly as the court.

Several experts called as witnesses for the defendant were allowed to state their opinions as to what caused the abortions and the facts upon which their opinions were predicated.

In this instance, at least, the rules of evidence were liberally interpreted in favor of the defendant. With respect to the opinions

expressed by such experts I shall only remark that after a careful consideration of the facts cited in support of their opinions it appears to me that as many reasons can be given in support of the finding of the jury as against it.

It appeared in proof that five of the animals lost their calves prematurely on the cars within a day or two after the collision; that similar accidents to the number of 103 in both herds occurred at short intervals during a period of 90 days, beginning with their arrival in Saline county. The greater number of abortions occurred within a comparatively short period after their arrival.

The testimony of all the experts tended to show that several abortions occurring in a herd such as these would quite likely cause other cows to miscarry that had sustained no physical injuries, such latter abortions being the result of disease or contagion engendered by the miscarriage of other animals.

867 Judge Phillips has already remarked that some of the abortions may reasonably be attributed to the collision because they were so closely related to it in point of time. He has further remarked that the time within which an animal would drop her calf in consequence of a physical injury would in each instance be largely dependent on the nature of the injury, the state of pregnancy, and the constitution and temperament of the animal. I will further add that such abortions as occurred so long after the collision that they cannot reasonably be supposed to have resulted from physical injuries may (as it seems from the testimony of experts) be attributed to a contagion existing in the herd which was occasioned by the collision without fault of the plaintiffs.

On the other hand it may be plausibly argued (as it was before the jury) that the abortions were in great part due to change of climate or to fatigue or injuries naturally incident to a long railroad journey, or to the plaintiffs' negligence in failing to isolate cows that had aborted.

The testimony in the case, however, tended to show that the ordinary incidents of a long railroad journey would not be liable to seriously affect a pregnant animal in that state of pregnancy which these cows appear to have reached.

After a careful review of all the testimony I conclude that there was evidence in the case from which the jury might rationally conclude, as they did and as a former jury appears to have found, that the abortions were the result of the collision. It may be conceded that the finding rests largely upon inferences that are, to a

868 certain extent, uncertain, which the jury must have drawn; but that is not a sufficient ground for overruling the action of a jury when it appears that tangible facts were established which furnished a reasonable basis for the opinion they may have formed.

I accordingly concur in the view that the motion for a new trial should be overruled if the plaintiffs in case No. 2024 elect to remit that portion of the verdict that is in excess of the sum claimed in the petition.

Philips, J., sitting with Thayer, J., on the hearing of the motion, submits the following opinion:

Opinion of Judge Philips on Motion for New Trial.

Jurisdiction.

My conclusion is that a foreign corporation having an office in this State is, under the present statute, to be treated as a non-resident defendant and the provision of subdivision four, sec. 3481, R. S. Mo., applies, and therefore the suit could "be brought in any county." It seems to me that the provisions of statute invoked by defendant must necessarily refer and be limited to domestic corporations.

Judge Hough, in Stone *vs.* The Travelers' Insurance Co., 78 Mo., 658, said: "The defendant, being a non-resident of the State, was subject to suit in any county in this State (R. S., sec. 3481), and could be personally served in the manner pointed out by the section under consideration. It may be conceded to defendant's counsel that this enunciation was not essential to the determination of that case; but it does not necessarily follow that the authority of this declaration can be waived by calling it a mere *obiter dictum*. It in no unmistakeable language indicated the view of the State
869 supreme court, and I am the more inclined to attach importance to it from the known fact that Judge Hough was a careful writer and was not given to inconsiderate expressions in matters of statutory construction.

There can be no question but that if this cause had remained in the State court, and the defendant, after moving to suppress the sheriff's return, had pleaded and gone to trial on the merits, the defective service would have been waived (Kronski *vs.* R. R. Co., 77 Mo., 362; Scoville *vs.* Glasner, 79 Mo., 454–'5), and it does seem to me that where a party has thus removed the cause into the Federal court and tried it on its merits, had one new trial, and has again retried it on the merits in its own approved jurisdiction, it would be trifling with the administration of justice to allow it to escape judgment on the ground that it had never been in court. As said in Scoville *vs.* Glasner, *supra*, "He ought not to make the court a place of chance and appeal only when he has failed on another accepted issue."

Abortions.

An examination of the evidence on this issue shows that it presented conflicting views and facts, bringing it especially within the province of a jury to try and draw such inferences and conclusions as to them might seem reasonable. In several instances the abortions followed so early after the collision, while en route and immediately after reaching the destination, as to make it quite probable that they were the direct result of the injury. In other instances the evidence was such as might well have justified the jury in concluding that other causes independent of the collision may have

occasioned the injury. But whether or not such inde-
870 pendent causes, or all combined, constituted the *causa causans* is not so apparent to my mind as to authorize the trial court to take the case, as to the whole or any part, from the jury. The proximate relation between the time of the injury and the time of abortion can have no defined limit as a matter of law. So much depends upon the constitution, temperament, and physical condition of the animal at the time that it must remain largely a question of fact and legitimate speculation whether or not the loss resulted from the injury. In this view I attach no great importance to the fact suggested by counsel that some of the cows apparently more seriously injured in the collision did not abort until some time after others seemingly less injured. Much would depend upon the peculiar nature of the injury, the state of pregnancy, the concussion in the region of the womb, and the constitutional temperament and health of the animal. The difficulty a jury may encounter in the analysis of testimony, the separation of substance from speculation and fact from mere conjecture, is no reason why the case should be withdrawn from their consideration. (Holcomb *vs.* People's Savings Bank, 92 Pa. St., 338; McCoy *vs.* Hyatt, 78 Mo., 139.)

It is only where the plaintiffs' evidence is such as to leave the jury to grope in darkness, with no substantial tangible facts to guide them, that the court should interfere. The moment the judge begins to adjust his judgment on considerations of the reasonableness of the jury's conclusion, drawn from disputable facts, there is danger of substituting his mind, his analysis and discrimination, for that of the jury, and thus indirectly deny to the litigant his consti-
871 tutional right of trial by jury.

The charge given to the jury pointed out to them very clearly the different facts bearing on this issue, and, as they are supposed to have heeded the charge, the presumption is they were satisfied from the evidence that the abortions were traceable to the collision rather than to any other reasonable source.

Measure of damages.

Criticism is made on this phraseology of the court's charge to the jury: "Having received the cattle for the purpose of transportation, the defendant was bound in law to deliver the respective herds of cattle at the terminus of its line in as good condition as it received the same."

It is suggested that this language was too comprehensive and was calculated to mislead, as it would include in the damages those incidents inseperable in the exercise of reasonable precaution from the transportation of live stock, such as stiffness or soreness or injuries done by one to the other, and the like. This language must be considered in connection with the whole charge and construed with reference to the subject-matter and the sense in which the jury of ordinary intelligence are to be presumed to have understood it. The subsequent part of the charge very clearly shows that the changed "condition" alluded to was such as resulted from defendant's culpable negligence as a carrier—in other words, from the

collision—as that was the gravamen of the complaint and the matter over which the contention was had.

Nor do I think there was any hurtful error in this respect as applied to the special instance of the bull "Lord William;" for,
872 while the plaintiffs' evidence tended to show that in his apparent condition when landed in Sabine county he was seriously injured or worthless, it must be presumed the jury heeded the subsequent facts developed that plaintiff realized $715 in his sale.

Under this head counsel make two other objections to the ruling of the court. One is that plaintiff should not have the benefit of the damages apparent at the time of the completion of the carriage; and the other, that they should have been required by their evidence to trace out the history of each animal sued for and show the result of the injury and consequent damage at a period beyond the time of delivery at the end of the journey. The argument is that the apparent condition of the animal may have been incident to mere travel, and without further proof the presumption would be that the animal soon recovered, and for such injury it is not liable as a common carrier. This proposition inevitably leads to the second contention that the plaintiff should, in developing his case, go beyond the date of arrival in Sabine county and trace out the history of each animal up to the date of trial. It is contended that the general rule of damages laid down by the court is applicable only to the carriage of inanimate substances, such as merchandise, and possibly to beef cattle destined to a known particular market, but not to cattle designed for ordinary use. The only authorities cited in support of this proposition are Street *vs.* Lanmier, 34 Mo., 469, and Gettell *vs.* West, &c., R. R. Co., 8 Allen, 560.

These cases but establish the rule that in the action of dam-
873 ages for an injury to a horse, where the animal recovers, the plaintiff may, under proper averments, recover for medicines and services in curing the animal and his depreciated value up to the time of trial. But this in nowise trenches upon the general rule that in the action of damages for breach of contract by a common carrier for the transportation of property injured *in transitu* the measure of damages "is the difference between the value of the goods as or in the condition when delivered and what their value would have been if they had not been damaged in the course of transportation." (3rd Suth. Dam., 237; Gray *vs.* Mo. R. R. Co., 64 Mo., 50.)

I know of no distinction made in favor of live stock. The instance put by counsel as to the shipment of beef cattle destined for a particular market does not help his argument. In that case the law will compel the shipper, if he had notice when he received the cattle that they are designed for a particular market, to pay the value of such cattle in that particular market on the date they should have been delivered without regard to the market value at the termination of the route when delivered. This is the exception to the general rule. So Sutherland, vol. 3, p. 242, says: "The carrier can be charged with no more than the market value there unless he has contracted to carry it there to fulfill a contract of sale at a greater price." And this author, both on reason and authority, in

the same connection proceeds to combat the proposition that the carrier should have the benefit of a contract by which the consignor was really to have less than the market value at the point of delivery when the carrier had no notice of such sub-contract.
874 The rule in question is one of protection to the carrier, and he ought not to be heard to complain of it.

Nothing is better established than that the plaintiffs for the purpose of augmenting their damages would not be permitted to show what they in fact did sell certain of the cows for. Although defendant might be permitted to do so (as was accorded to it in this case) for the purpose of showing that plaintiffs in fact were not damaged or to the extent claimed, why, then, require plaintiffs, in the first instance, to proceed affirmatively to trace out the subsequent history of each cow when they could not enhance the measure of damages by showing that in the final disposition they received only so much for her?

Again, such a rule would in practice lead to confusion and involve the jury in the inextricable mesh-work of collateral issues and enquiries after facts absolutely unascertainable with any proximate certainty. Rules of law for the attainment of justice must be uniform and certain. The rule as to the measure of damages permits the plaintiff-, up to the time of trial, to show the condition of the injured animals merely as a means of ascertaining the result of the injury inflicted so as to better enable the jury to fix the damages at the time and place of delivery. If the cows did subsequently abort this is proof only of the extent of the injury inflicted, as much so as if they had subsequently died from the effect of the collision. The only known limit to the inquiry up to the trial is whether or not the subsequent development in the condition of the ani-
875 mal is traceable directly to the injury inflicted by the carrier. (Kain *vs.* R. R. Co., 29 Mo. App., 61–2; Sorenson *vs.* N. P. R. Co., 36 Fed. Rep., 166, 167.) The direct proximate consequences of a wrongful act are those which occur without any intervening independent cause and the extent of time between the injury and the consequence does not affect the rule. (Brown *vs.* R. R. Co., 54 Wis., 342.)

II. It is further insisted, in this connection, that the evidence on the part of the defendant especially tended to show that the effect of an abortion on a cow is too conjectural and uncertain to make it the basis of damages. To support this assumption it is cited that a cow having once aborted may, under certain conditions of treatment and reletting to the bull, breed again, and that abortions may measurably be prevented by the isolation of the pregnant cow. But how do such facts affect the question of such injury and abortion depreciating the market value of the cow? As well say that the market value of a stallion is not affected by the fact that he is an uncertain foal-getter, or is certain only under favoring conditions of treatment and delays not common to other breeders. This very fact depreciates his market value, and proof of it should go to the jury for them to say to what extent it impairs his value.

It is further urged that such damages are special and not the

natural and ordinary result of the injury. As well might it be said that in the case of a female passenger in a state of pregnancy receiving an injury in a collision she might have recovered
876 without difficulty or serious consequence but for the fact that she happened to be enciente, and the injury brought on premature delivery, resulting in death. The railroad company could not attribute the death to the abortion and escape damages consequent thereupon, for he whose negligent act puts in motion an instrument of mischief is answerable for the consequences directly flowing from the wrongful act.

Defendant seems to complain that plaintiffs were permitted to show that the cows were designed for breeders, and that it should not be held to the measure of damages without having notice of such fact when it made the contract of shipment; the result of which would be that in estimating the market value of the cows the standard would be their value for beef. If this were admissable, the facts and circumstances are such as to affect defendant with notice. It knew these cows and bulls were imported from Europe; they were not going East in the direction of the beef market. Why were they being brought from abroad and carried across the continent to the interior of Missouri? No jury on such evidence would be permitted by the court to find that defendant had a right to suppose that such cattle, consisting of bulls, cows, and heifers, were designed merely for beeves. No jury could hesitate to find from facts so obvious to the common sense of mankind that defendant had notice of the fact that such cattle were designed for breeding purposes. The learned counsel for defendant recognizes this obvious fact in his argument in this cause, where, on
877 page 26, he says, "Seven head were sold in Denver in 1885. They were evidently sold as breeders, as cattle are not shipped there for beef." The fact that such cattle would likely breed or not would, in the ordinary course of things, affect their market value in Saline county, as the evidence abundantly shows; and if, by reason of the injury, that market value was depreciated it is a consequential damage directly ensuing from the injury. The charge to the jury, in its separation and classification of the facts, clearly put the burden of proof on plaintiffs to show what damages were sustained through injuries and abortions. After plaintiffs made proof of the number of abortions and the effect thereof on the market value of the cows they had made out a *prima facia* case. The defendant was then accorded the right to follow up in detail the subsequent history of each injured animal, and show, if the fact existed, that the real damage was less than that claimed by plaintiffs. The fact that it may have been difficult or inconvenient for defendant to do this cannot alter the rules of law or evidence. The argument "*ab inconvenienti*" would often overturn most valued and deep-rooted rules. This is an entire misapplication of the rule of evidence invoked by counsel that the party in whose exclusive possession certain evidence is should produce it.

Notice.

It is insisted with great zeal and ability by defendant that it should not be held to accountability for the result of the mis-
878 carriages of the cows without proof of notice to it at the time of their acceptance for transportation that the cows were pregnant. The general rule on this subject is well stated in Hart *vs.* Penn. R. R. Co., 112 U. S., 340: "As a general rule and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods, though he is ignorant of its contents and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition, by misrepresenting the nature or the value of the articles, he destroys his claim to indemnity." So Sutherland on Damages, vol. 3, 343–'4, clearly recognizes the liability of a carrier where he has failed to qualify his liability by a notice to the shipper or qualification of the contract.

Counsel for defendant, having to concede this general rule, contend that it is limited to the mere value of the property taken for transportation, but does not apply to the condition of the property. In support we are cited to the nitro-glycerine case, 15 Wall., 524. This case is not pertinent. It presented the question as to defendant's liability for injury to adjacent property occasioned by the explosion of a package of glycerine opened by him, without carelessness, in ignorance of its contents, which package was taken for transportation.

879 It did not involve the question as to whether or not the carrier would have been liable for the loss or injury to the package taken by him in ignorance of its contents when received.

In Hart *vs.* R. R. Co., *supra*, the shipper was not permitted to recover the actual value of his race-horses injured in transportation, for the sole reason that he had by special contract limited the carrier's liability to a less valuation. The reading of this case, however, and the authorities therein cited can leave no doubt that but for the special contract the carrier would have been liable for the inherent value of the racers, although unknown to it at the time of acceptance for transportation.

The case of McCune *vs.* R. R. Co., 52 Ia., 600, presents a case more in point. That was an injury in transportation to a cow with calf. While it is true the cow was so far advanced in pregnancy as possible to have warranted the inference of notice of the fact, yet the opinion of the court is not so confined, but in unmistakable terms the court lays down the law to be that shippers of live stock are not required "to seek the agent of a carrier and make known the physical condition of his stock." The opinion further says: "As well require each passenger upon purchasing his ticket or upon boarding the train to make known his physical condition, so that the carrier might exercise more care in running the train to avoid collisions or accidents from other causes."

Suppose a woman, in a state of pregnancy not obvious to the casual observer, should take passage on a railroad car and
880 through the negligence of the carrier receive an injury resulting in abortion, greatly impairing her general health and usefulness. In an action for damages would not proof of this fact be competent in aggravation of damages as the direct result of the injury? and would it be any defense that on taking passage she did not notify the ticket agent and conductor that she was enciente? I think these questions are answered adversely to defendant's contention in the cases of Oliver *vs.* Town of La Valle, 36 Wis., 592; Stewart *vs.* City of Ripon, 38 Wis., 591.

The verdict.

Time will not permit me to enter upon an analysis of the evidence to show whether or not there was evidence to reasonably justify the amount of the jury's award. The attention of the jury was clearly enough directed to the evidence touching the result of the injuries and as to what number and the character of cattle were affected. As a matter of course, what the plaintiffs paid for the cattle in Scotland and what they cost them landed in Saline county could not be considered by the jury. There was evidence in the case to warrant the amount of the verdict. It is true that the conclusions of the jury must in part have been predicated upon expert testimony. But if that testimony was competent its probative force was for the jury. It would involve a contradiction in practice for the court to hold that certain evidence was admissible for the establish-
881 & 882 ment of a given fact, and then say that, although it carried satisfaction to the minds of the jury, the court would not abide the finding, as it may have been rather problematical than founded on known facts.

883 And afterwards, on the 27th day of November, A. D. 1888, it being in vacation of the said circuit court, the following further proceedings were had in said cause, to wit:

Appeal Bond Filed.

WALLACE ESTILL *et al.*
vs.
NEW YORK, LAKE ERIE & WESTERN RAILWAY CO. } 2023.

LEVERETT LEONARD *et al.*
vs.
NEW YORK, LAKE ERIE & WESTERN RAILWAY CO. } 2024.

This day comes the defendant in the above-entitled cause, The New York, Lake Erie and Western Railway Company, and files its appeal bond in the sum of ninety thousand dollars ($90,000), duly approved by the Honorable John F. Philips, district judge, which

is now filed as of date November 20th, 1888, pursuant to agreement of counsel and the order of court heretofore entered of record.

The appeal bond filed as aforesaid is in words and figures following, to wit:

Appeal Bond.

Know all men by these presents that we, The New York, Lake Erie & Western Railroad Company, as principal, and the American Surety Company of New York, as surety, are held and firmly bound unto Leverett Leonard, Charles E. Leonard, William H. Leonard, and Abiel Leonard and unto Wallace Estill, Hugh W. Elliott, and William R. Estill in the full and just sum of ninety thou-
884 sand dollars, to be paid to the said Leverett Leonard, Charles E. Leonard, William H. Leonard, and Abiel Leonard, Wallace Estill, Hugh W. Elliott, and William R. Estill, their or either of their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of November, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at the November term, 1888, of the circuit court of the United States for the central division of the western district of Missouri, in two suits depending in said court, consolidated and tried as one before the same jury, in one of which Leverett Leonard, Charles E. Leonard, William H. Leonard, and Abiel Leonard and in the other Wallace Estill, Hugh W. Elliott, and William Estill were plaintiffs and The New York, Lake Erie & Western Railroad Company was defendant, judgments were rendered against the said New York, Lake Erie & Western Railroad Company in favor of Leverett, Charles E., William H., and Abiel Leonard for fifty thousand dollars, with interest at six per cent. from May 1st, 1888, and in favor of Wallace Estill, Hugh W. Elliott, and William R. Estill for eleven thousand one hundred and twelve and $\frac{5}{100}$ dollars, with interest at six per cent. from May 1st, 1888; and the said New York, Lake Erie & Western Railroad Company having obtained a writ of error of the said court to reverse the judgments in the
885 aforesaid suit, and a citation directed to the said Leverett Leonard, Charles E. Leonard, William H. Leonard, and Abiel Leonard, and to Wallace Estill, Hugh W. Elliott, and William R. Estill, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said New York, Lake Erie & Western Railroad Company shall prosecute said writ of error to effect and answer all damages and costs

if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

THE NEW YORK, LAKE ERIE & WESTERN
[SEAL.] RAILROAD COMPANY,
By JOHN KING, *President.*
AMERICAN SURETY COMPANY OF NEW
[SEAL.] YORK,
By HENRY D. LYMAN, *Vice-President.*
FRED. F. NUGENT, *Secretary.*
Attest: A. R. MACDONOUGH, *Secretary.*

Signed, sealed, and delivered in the presence of—
H. G. HINTON,
As to Am. S. Co.

Approved Nov. 26th, 1888.
JNO. F. PHILIPS, *Judge.*

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

886 On this 15th day of November, 1888, before me personally appeared Henry D. Lyman, vice-president of the American Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city of New York; that he is the vice-president of the American Surety Company of New York; that he knew the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as vice-president of said company by like authority, and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, chapter 486, of the Session Laws of 1881; and the said Henry D. Lyman further said that he was acquainted with Fred. F. Nugent and knew him to be the secretary of said company; that the signature of the said Fred. F. Nugent subscribed to the said instrument is in the genuine handwriting of the said Fred. F. Nugent, and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said Henry D. Lyman, vice-president.

H. G. HINTON,
Notary Public, Kings Co., N. Y.

Cert. filed in N. Y. Co.

And afterwards, on the 30th day of November, A. D. 1888, it being in vacation of the said circuit court, the following further
887 proceedings were had in said causes, to wit:

WALLACE ESTILL *et al.*
vs.
NEW YORK, LAKE ERIE & WESTERN RAILWAY CO. } 2023.

LEVERETT LEONARD *et al.*
vs.
NEW YORK, LAKE ERIE & WESTERN RAILWAY CO. } 2024.

This day there is received and filed in the above-entitled causes a stipulation of counsel, dated November 20th, 1888, and which is now filed as of said date, to wit:

Stipulation Filed as to Bill of Exceptions, Writ of Error, etc.

"Whereas the above-entitled causes were, by order of court, tried together before one and the same jury, rendering a separate verdict in each case, it is hereby stipulated and agreed that one bill of exceptions covering all matters that arose on the said trial of said causes may answer for both cases, and that the bill of exceptions signed by Judges Thayer and Philips may be incorporated in the record and used in the Supreme Court of the United States as the bill of exceptions in either or both of said cases without objection from either party. It is further agreed that one writ of error and one citation shall be sufficient, and that one supersedeas bond may be given to cover both cases. November 20th, 1888."

Which said stipulation is as follows:

888 *Stipulation.*

In the Circuit Court of the United States for the Central Division of the Western District of Missouri, November Term, 1888.

LEVERETT LEONARD *et al.*, Plaintiffs,
vs.
NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, Defendant.

WALLACE ESTILL *et al.*, Plaintiffs,
vs.
SAME DEFENDANT.

Stipulation to be entered of record in the above causes.

Whereas the above-entitled causes were, by order of court, tried together before one and the same jury, rendering a separate verdict in each case, it is hereby stipulated and agreed that one bill of exceptions covering all matters that arose on the said trial of said causes may answer for both cases, and that the bill of exceptions signed by Judges Thayer and Philips may be incorporated in the record and used in the Supreme Court of the United States as the bill of exceptions in either or both of said cases without objection from either party. It is further agreed that one writ of error and

one citation shall be sufficient, and that one supersedeas bond may be given to cover both cases. November 20th, 1888.

POLLARD & WARNER,
Att'ys for Pl'ff in Error.
DRAFFEN & WILLIAMS AND
COSGROVE & JOHNSTON,
Att'ys for Def'ts in Error.

889 UNITED STATES OF AMERICA, } *scl:*
Central Division of the Western District of Missouri, }

I, Henry C. Geisberg, clerk of the circuit court of the United States in and for said district, central division, do hereby certify that the foregoing writing is a true transcript of the record and proceedings in the causes entitled Wallace Estill and others against The New York, Lake Erie and Western Railroad Company (No. 2023) and Leverett Leonard and others against The New York, Lake Erie and Western Railroad Company (No. 2024), as fully as the same remain on file and of record in my office.

Seal of the United States Circuit Court for the Western District of Missouri, Central Division.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at office, in the city of Jefferson, in said district, this 19th day of September, 1889.

H. C. GEISBERG, *Clerk.*

890 In the Supreme Court of the United States, October Term, 1889.

NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Plaintiff in Error, *vs.* LEVERETT LEONARD *et al.*, Defendant-in Error, and SAME *vs.* W. R. ESTILL *et al.*, Defendant-in Error.	Error to the United States Circuit Court for the Central Division of the Western District of Missouri.

Assignment of Errors Covering Both Cases.

And now comes The New York, Lake Erie and Western Railroad Company, plaintiff in error, by James A. Buchanan, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. The circuit court erred in overruling the motion of plaintiff in error to set aside the return of the sheriff on the original writs issued in said causes and to quash said writs.

2. It erred in admitting improper and incompetent evidence offered by plaintiffs below.

891 3. It erred in excluding proper and competent evidence offered by defendant below.

4. The verdict of the jury is unsustained by the evidence in the case.

5. The circuit court erred in charging the jury.

6. It erred in refusing to charge the jury as requested by the defendant below.

7. It erred in rendering judgments upon the verdict in favor of the plaintiffs below.

And the said New York, Lake Erie and Western Railroad Company, plaintiff in error, prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it hath last by reason of such judgments, &c.

October 10, 1889.

JAMES A. BUCHANAN,
Attorney for Plaintiff in Error.

892 [Endorsed:] Supreme Court U. S. 1889, October term. No. 1294. The New York, Lake Erie & Western R. R. Co., pl'ff in error, *vs.* Wallace Estill *et al.* Assignment of errors.

[Stamped:] Office Supreme Court U. S. Filed Oct. 11, 1889. James H. McKenney, clerk.

Endorsed on cover: Case No. 13,701. W. Missouri C. C. U. S. No. 461. The New York, Lake Erie & Western Railroad Company, plaintiff in error, *vs.* Wallace Estill, Hugh W. Elliott, and William R. Estill, and Leverett Leonard, Charles E. Leonard, William H. Leonard, & Abiel Leonard. Filed October 5, 1889.

IN THE

Supreme Court of the United States.

TO THE OCTOBER TERM, 1889.

CASE NO. 13,701.

NO. 127, OCTOBER TERM, 1892.

NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY,
Plaintiff in Error,

vs.

WM. R. ESTILL, WALLACE ESTILL AND HUGH ELLIOTT,
Defendants in Error,

AND SAME COMPANY,
Plaintiff in Error,

vs.

LEVERITT LEONARD, CHAS. E. LEONARD, WM. H. LEONARD AND ABIEL LEONARD,
Defendants in Error.

Suits in Attachment.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

These suits was originally brought as suits in attachment, in the Circuit Court of Saline County, Missouri, and writs of attachment were issued in both, to the sheriff

of that county, and also to the sheriff of the City of St. Louis, which is itself a county, returnable to the February term of said court, 1884. The sheriff of Saline county returned the said writs directed to him, stating that he had found no property on which to levy, and without personal service. The sheriff of the City of St. Louis returned the writs directed to him, on the 7th day of January, 1884, stating that he had executed the writs by delivering a copy of the writ and petition in each case, as furnished by the clerk of the Circuit Court of Saline county, to W. C. Connor, city passenger agent of the defendant, who was in its business office in said city, and had charge thereof at the time of said service. The return is the same in both cases. No property was attached in either case.

The railroad company, defendant, on the first day of the February term of said court entered a special and limited appearance for that purpose only, and petitioned the court for the removal of said causes to the Circuit Court of the United States for that district, on the ground that the plaintiffs were all citizens of the State of Missouri, and that defendant was a corporation organized under the laws of and was a citizen of the State of New York, on which the court ordered the cases removed to the Circuit Court of the United States for the Western Division of the Western District of Missouri.

On the first day of the next term of the latter court after said order of removal defendant enters a special appearance in that court, and filed its motion in both cases to quash the said writs issued to the sheriff of the City of St. Louis, and the return of service thereon, on the ground that defendant could not be brought into the Circuit Court of Saline county by serving a writ on its agent in its business office in the City of St. Louis, and that said Circuit Court of Saline county could not and did not, acquire jurisdiction over defendant by virtue of such writs and service in these cases. The court overruled the motions.

The defendant excepted to the ruling of the court, and preserved its exception by a bill of exceptions then signed. *The ruling of the court on these motions presents the first question arising in the case.*

The court having decided against the defendant on the question of jurisdiction, it filed a general denial to the petition in each case. The petition in the Leonard Bros. case alleges that the plaintiffs in that case, on the 12th day of September, 1883, were the owners of three hundred and six head of imported polled Angus or Aberdeen, and Galloway cattle, which they had imported at great cost and expense from Scotland, and which were of the value of two hundred thousand dollars.

"That said cattle were intended for the Missouri "market; that defendant had *full knowledge of the value "of said cattle and the purposes for which they were in- "tended;* that defendant is now and was on said 12th day "of September, 1883, a railroad corporation duly organ- "ized and existing according to law, and as such was en- "gaged in running and operating a railroad through the "States of New York and Ohio and was, as such corpora- "tion, a common carrier of live stock and other freight "over the line of its railroad in said States. That on or "about the said 12th day of September, 1883, plaintiffs "delivered to the defendant as such common carrier to be "transported over its line of railway, the said three hun- "dred and six head of imported cattle, and that de- "fendant received them as such common carrier, *well know- "ing the value of said cattle and the importance of trans- "porting them with care*, and reasonable dispatch. That "thereupon defendant as such common carrier undertook "and became bound to transport said cattle over its said "railway safely, and to deliver them *at the terminus there- "of* within a reasonable time after they were delivered to "and received by it. That plaintiffs paid the usual and

"customary freight and charges for the transportation of "said cattle over defendant's said road.

"The defendant wholly in disregard of its duty as "such common carrier and in violation of its said under- "taking, failed and neglected to transport said cattle in "safety and with reasonable dispatch; but on the contrary, "on or about the 16th day of September, in the year afore- "said, at Nankin, in the State of Ohio, negligently and care- "lessly run the two trains or sections of a train upon which "said cattle were being carried over defendant's railway, into "and against each other with such force and violence that a "large number of the cars, to-wit, about sixteen, in which "said cattle were at the time, were broken to pieces and "wholly demolished, and plaintiffs said cattle greatly jarred, "bruised, maimed, wounded, crippled and injured, and a "number of said cattle, to-wit, seven head killed, or so badly "crippled and injured that they were rendered wholly worth "less and a total loss to plaintiff. That about two hundred "and fifty of said cattle were cows in calf, and that about "sixty of them since said injury and accident, and in con- "sequence thereof, have prematurely *lost their calves*. "That said cattle were detained at the place of said acci- "dent for about thirty-six hours after the same occurred, "without suitable food, water, or attention, and in conse- "quence of which they were greatly damaged and depre- "ciated in value.

"That plaintiffs, in consequence of the injuries re- "ceived by said cattle as aforesaid, have been put "to great trouble and expense in caring for and attending "to them, and by reason of the accident the value of said "cattle was greatly reduced.

"That by reason of the premises plaintiffs have sus- "tained damages in the sum of fifty thousand dollars, for "which and costs they pray judgment."

The petition in the case of Estill *et al.* alleges that on the 12th day of September, 1883, they were the owners

of seventy head of imported polled Angus or Aberdeen cattle, which they had imported at great cost and expense from Scotland, and which were of the value of thirty-five thousand dollars. "That said cattle were intended for the Missouri market, and *defendant had full knowledge of the value of said cattle* and the *purposes for which they were intended.*" "That defendant is now and was on the said 12th day of September, a railroad corporation engaged in running and operating a railroad through the States of New York and Ohio, and a common carrier of live stock and other freight over its line in said States."

The allegation in relation to the accident are the same as in the petition in the Leonard case; and that by reason of the collision a large number of the cars were broken, and the cattle therein were thrown violently and forcibly against the cars and each other and "greatly jarred, bruised and maimed, wounded and injured. That fifty-five head of said cattle were cows in calf, at the time of the collision, and that about twenty of them have since, and in consequence of said collision, prematurely *lost their calves.* That said cattle were detained at the place of said accident for about thirty-six hours after the same occurred without suitable food, water or attention, and in consequence of which they were greatly reduced in value, and damaged. That plaintiffs have in consequence of the injuries received by said cattle as aforesaid, been put to great trouble and expense in caring for them, and the value of said cattle was greatly reduced and depreciated."

"By reason whereof plaintiffs have sustained damages in the sum of twelve thousand dollars, for which sum and costs they ask judgment."

At the November Term, 1885, of said court, these cases were consolidated, by order of the court, and tried together before Judge Krekel and a jury.

The jury found for the plaintiffs and assessed damages in favor of Leonard Bros. at $26 983.60, and in favor

of Estill and Elliott at $6,178.79. These verdicts were set aside by the court, and a new trial granted.

At the October Term, 1886, the cases were, in order to obtain a more speedy trial, by stipulation saving all the rights of the parties, transferred to the eastern division of the district, where they were tried at the April Term, 1888, before Judge Thayer (who held said court in the place of Judge Krekel, who was unable to preside, on account of sickness), and a jury. The trial resulted in verdicts for the plaintiffs, and the jury assessed the damages, in the Leonard Bros.' case of $44,000, and allowed interest in the sum of $11,880, making the total damage assessed $55,-880; and in the Estell & Elliott case $8,750, and allowed interest in the sum of $2,362.50, making total damages assessed $11,112.50.

Motion for new trial was made and heard before Judge Thayer, who presided at the trial, and Judge Philips, District Judge of the Western District, who had been appointed to fill the vacancy caused by the death of Judge Krekel, which occurred between the time of the trial and the hearing of the motion. The court overruled the motion for a new trial on the terms that the plaintiffs in the Leonard Bros.' case remit $3,000 of the damages assessed in their favor, that being the amount in excess of that claimed in the petition. This was done and judgments were entered on the verdicts at the November Term of said court, 1888. By stipulation of record it was provided that one citation, one writ of error, and one bill of exceptions covering the matters arising in the course of the trial, should be sufficient in both cases. Writ of error was allowed November 20, 1888, and served by lodging a certified copy thereof, for defendants in error, in the clerk's office, where said record remained on the 20th day of said November. Service of citation was acknowledged by defendants in error, and supersedeas bond given, and approved.

These suits are brought to recover damages for injuries alleged to have been sustained by plaintiffs' cattle in a wreck at Nankin, a station on defendant's road in the State of Ohio, caused by a collision between two sections of the train on which their cattle were being transported. It was not denied on the trial, and is not now, that plaintiff in error is liable for the result of said collision. The questions presented by the record grow out of the extent and nature of its liability, and the measure or rule of damages to be applied—and these questions arise mainly, if not altogether, upon the rulings of the court upon testimony offered by plaintiffs below, and the instructions given and refused.

The evidence in the case shows, or tends to show, substantially the following state of facts: In the early part of the year 1883, the Leonard Bros. went to Scotland where they purchased three hundred and fifteen head of Galloway and Aberdeen Angus cattle. These cattle are hornless, black, and so nearly alike that they cannot be distinguished one from another. The only difference between the Galloways and the Aberdeen Angus is that the latter are a finer grade for beef, and will sell for about twenty-five per cent. more than the Galloways. Of this lot, fifty-four or fifty-five were bulls, about a dozen were cows, and the balance heifers, mostly between one and two years of age, that had never born calves. Estill & Elliott bought sixty-seven head, twelve bulls, the rest cows and heifers. The plaintiffs were all large farmers, extensively engaged in breeding, raising and dealing in cattle, and these cattle were bought for the purpose of breeding on their farms, in part, and in part for sale. *But there is no evidence in the record to show that the defendant knew the purpose for which they were intended, though the petitions so allege.*

Both lots of cattle were shipped on the same steamer, at Liverpool, on the 1st of July, 1883, bound for Boston,

where they arrived on the twelfth. They were, immediately on their arrival, loaded into box cars and taken eight or nine miles to the government quarantine at Waltham.

On their arrival at Waltham, the following morning, one of the Leonard Bros.' heifers was found dead in the car, and two others died the next day. One of these was opened, and found not to be in calf. The cause of the death of these heifers was supposed to be suffocation or exhaustion. The accommodations, at Waltham, being inadequate, one of the plaintiffs visited Washington and obtained permission to remove the cattle to Concord, about ten miles from Waltham, and they were taken there the forepart of August. While at Concord, one of the Leonard Bros.' heifers was taken sick and placed in a stable with eight or ten other cows and heifers for treatment. While there she aborted, but was allowed to remain in the stable with the other cows. Not long after that a number of the cattle were poisoned by eating Paris Green, which had been left in a field occupied by the cattle, and thirty-six of the Leonard Bros.' heifers were taken up and treated by a veterinary, Dr. Childs. Five of these died, and two of the five *aborted their calves.* The remaining thirty-one apparently recovered, and were turned out with the rest of the herd. There is no positive evidence that any of the Estill & Elliott cattle ate of the Paris Green, but the cattle were breaking out from one lot to the other, and getting mixed up.

On the 13th of September the cattle were shipped at Concord by the Fitchburg Railroad, under a verbal contract made by Leveritt Leonard, for both lots of cattle, at so much a car to carry the cattle to Chicago. They were loaded into ordinary stock cars, and in the ordinary way, except that feed and water were provided in the cars to avoid the necessity for unloading on the route.

There is no evidence that defendant knew that any of

the cows or heifers were in calf, or that Chicago was not the final destination of the cattle.

Under this contract Chicago was the point of destination for these cattle. Between Concord and Chicago, the defendant was an intermediate carrier, and its line of road was confined to the States of New York and Ohio, the western terminus on the Chicago route, over which these cattle were being transported, being at Marion, Ohio. Before reaching Nankin, a station in Ohio, the train containing these cattle was divided into two sections, of fifteen cars each. At Nankin, on or about the 16th day of September, between four and five o'clock in the morning, while the first section of the train was standing on the side track, the second section, following, ran into it, destroying three or four of the stock cars, and injuring five or six others, so that the cattle had to be unloaded from them. Four of the Leonard Bros.' heifers were killed, and one other heifer, and two bulls were so injured that they were unable to go on with the other cattle. The two bulls left at Nankin partially recovered from their injuries, and were able to serve cows. The injured heifer was found under one of the cars with a wheel resting on her leg. She recovered and turned out to be in calf, which she bore at the regular time, and continued to be a regular breeder. These two bulls and the heifer were left at the wreck, and were taken care of by the defendant. They were never demanded by the Leonard Bros., and were never forwarded to them.

Twelve cars out of the forward section of the train went forward soon after the wreck, the cars and their contents being in apparent good order. The rest of the cattle were detained twenty-six or twenty-eight hours, waiting for cars to replace the eight or nine that were rendered unserviceable by the collision. During this time the cattle that had been taken from the broken cars were running in open lots in the vicinity where these cattle were reloaded, and with the exception that some of them appeared a little stiff,

they showed no external signs of injury, except as to one of the Leonard Bros.' bulls, named Lord William, which was injured in the lower joint of his hind leg. He recovered, and was sold at the Kansas City sale in November for $715. One of the Estill and Elliott cows aborted in the cars on the evening of the day she left Nankin, and another before she reached Chicago.

From Chicago, the Leonard Bros.' cattle were shipped to Mt. Leonard, Saline County, Missouri, by the Chicago and Alton Railroad; and the Estill and Elliott cattle to Estill station, Howard County, Missouri, by the Wabash Railroad, where they arrived on the 21st or 22d of September, these being the points of final destination for the cattle, and the places where the plaintiffs resided.

It is claimed that three more of the Estill cows aborted on the cars, five or six on the farm before, and two after the Kansas City sale, making eleven or twelve in all. It is not claimed that any of the Leonard cows aborted before reaching destination. A day or two after the arrival, the Leonard's cattle were divided, W. H. Leonard taking a fourth, Abiel a fourth, and Leveritt and Charles one-half. The half set off to Charles and Leveritt, being about 150 head, were taken charge of by Leveritt, fifty or fifty-seven of which being cows and heifers, were taken to a farm five or six miles from Mt. Leonard, where they were put on pasture. *None of these aborted.* The rest were kept on Leveritt's farm, consisting of about seventy-five cows and heifers, and twenty-five bulls.

W. H. Leonard testifies that twenty-seven of his cows aborted, Abiel that twenty-five of his, and Leveritt forty-three of those set off to him and Charles that were on his farm. These abortions commenced two days after the cattle arrived, and continued to occur, at intervals, until the last of December, or the forepart of January, following.

In addition to this, it is claimed, and the evidence for the plaintiffs tends to prove it, that other cows and

heifers, and some of the bulls, arrived in a damaged condition, and that some of the injured bulls and heifers died, while others recovered. But the evidence shows that all of the heifers that died, or showed signs of physical injury, were in calf, *and did not abort*. On the arrival of both lots of cattle at destination, the plaintiffs called in some of their neighbors and friends, and had them appraise the damage to the cattle.

The Estill and Elliott cattle were appraised as they were unloaded from the cars, and the Leonard cattle the day after their arrival. None of the appraisers had ever seen the cattle before. These appraisers were all witnesses on the trial for plaintiffs, and testified that the cattle were generally in bad condition, stiff, sore, lame and bruised, and when they could specify any special injury to an animal they were allowed to give the market value of the animal, as it arrived, which was generally nothing, and what would have been the market value of the animal had it arrived in good order and condition, which was fixed at $500 to $600 each. Defendant objected to this mode of assessing the damages, but the court overruled the objection, and defendant excepted (pp. 154–5).

Defendant objected to the introduction of testimony on the subject of abortion, on the following grounds: *first*, that it was not liable for such an injury at all, in the absence of knowledge that the cows were in calf; *second*, that if liable at all it would be only for the physical injury to the cow, if any, and perhaps the loss of the calf, but that its liability would not extend to the *effect* of the *abortion* on the cow as a future breeder, that being under the evidence, too remote, uncertain and speculative; *third*, that the evidence in relation to the market value of aborted cows at the time of their arrival was improper because the evidence itself shows that there was no market value for such cows, and that it did not furnish the true measure of damages, especially in the absence of knowledge on the part

of defendant that the cattle were intended for sale on the market, and in the face of the fact that they were not all intended for sale. The testimony for plaintiff tended to show that if these aborted cows had arrived in good condition they would have been worth from $450 to $500 a head, but that having aborted they were worth what they would bring for beef, $25 to $40, and this without regard to whether the abortion *actually* injured the cows as breeders. *The injury was to her reputation.*

The rulings of the court in admitting testimony in relation to abortions, and fixing the rule of damages in such cases at the difference in the market value of the cow in the two conditions, with the instructions given and refused on the same subject, raise some of the most important questions in the case.

Defendant had both herds of cattle examined a week after their arrival at destination, by three competent witnesses, A. S. Baldwin, its general live stock agent, J. McCulloch, a Scotchman familiarwith this breed of cattle, and Geo. F. Geagon, stock agent of a Chicago road, who all testified that they made a careful examination of all the cattle but discovered no injuries that might not reasonably have been considered as the result of such a journey as these cattle had taken without any accident; that some of them appeared a little stiff and sore, but that none showed signs of physical injury except one heifer in the Estill and Elliott lot who had her foot done up in a poultice, which, when removed, showed a foul hoof. The cattle in both lots appeared in very good condition for cattle that had come such a long journey. These witnesses asked Estill and Elliott to point out the cattle which they claimed were injured, which they declined to do, saying that as they were there to ascertain the damages they might look for themselves. The Leonards went around among their cattle with them and pointed out such as they claimed were injured physically, and such cows as they claimed had abort-

ed, but these witnesses found no signs of abortion in those pointed out and no physical injuries to the other cattle except what might have been expected from the journey from Scotland to Missouri.

Defendant introduced medical and expert testimony showing that abortions caused by physical violence would occur generally within forty-eight hours after the injury; that abortions would occur from contagion or sympathy, and that when a cow aborted she should be separated from all other cows in calf, and that a bull that had been bred to an aborted cow should not be afterwards bred to another cow. That an abortion did not necessarily affect injuriously the future breeding qualities of a cow, and that if she is properly attended to, it will not, and the cow will continue a breeder.

In the forepart of November, 1883, a combination sale of Galloway and Angus cattle was held at Kansas City, to which breeders from many points of the country brought their stock. It was a *combination sale*, and each breeder was limited in the number of cattle to be offered. Estill and Elliott were allowed thirty head. They sold twenty-seven winter cows and heifers and eight bulls, all of this lot averaging $474.50 a head; all Angus cattle. Among the cows sold was HEATHERBELL OF FARMTON, *one of the cows claimed to have aborted* on the cars. *She sold for $805.*

It does not appear how many cattle the Leonard Bros. took to this sale, but they sold sixty-nine head of Galloway and Angus cattle, fifty-five head of cows and heifers, averaging $342, and fourteen bulls averaging $469 a head. Among the bulls was LORD WILLIAM, who appeared to be the worst injured of any of the bulls. He brought $715, *the highest price paid for any bull at the sale.* The plaintiffs' appraisers had pronounced him worthless on his arrival. (See Report of Sales, pp. 491 to 495).

Those portions of the charge to the jury that are ex-

cepted to, and the instruction asked by the defendant and refused, are given below in the assignment of errors.

SPECIFICATION OF THE ERRORS RELIED UPON.

I.

The court erred in overruling defendants' motion to quash the writs, and the returns of the sheriff of the City of St. Louis thereon.

II.

The court erred in admitting improper testimony offered by plaintiff, as follows, viz:

The deposition of John Cunningham was read by plaintiffs. He testified as follows, p. 59:

Question. "State, if you know, how many of these cows and heifers, which were kept at Mr. Leverett Leonard's place, aborted their calves and about when they aborted?"

Counsel for defendant objected to the question on the ground that the damages sought to be proven were too remote. The court held that he would reserve his ruling, and that plaintiff could go on and read the deposition, which he did, as follows:

Witness answered: "My recollection is that there were over twenty that aborted their calves during the time I was there."

Ques. "Do you know whether those on the other places lost their calves?" Ans. "I do not."

Ques. "Do you know whether the cows and heifers shipped from Scotland were served by bulls before they left and were in calf?" Ans. "Yes, I do. All the heifers and cows over two years of age were in calf before they left Scotland."

Ques. "State whether you have shipped any of the same breed of cattle from Scotland to this country since

then, and when and how many?" Ans. "Yes, I shipped 95 head on the 5th of November, 1884, from Glasgow to Boston."

Ques. "Judging from you experience as a shipper of this class and blood of cattle from Scotland to this country, would the trip across the ocean, and the detention in quarantine, and shipment by rail to Missouri, cause cows to prematurely lose their calves or abort them, if no unusual accident occurred to them?" Ans. "It would certainly not."

Ques. "Have you known of other cows in calf being shipped from there to this country, and, if so, state whether the trip has caused them to lose their calves or abort?" Ans "Yes, I have known of others being shipped and without losing their calves from the effect of the shipment."

Ques. "How many shipments have you known to have been made?" Ans. "I have known of six or seven shipments from Scotland to America. Shipped from my own farm in Scotland. The most of these shipments were heifers in calf before they left, and I have never heard of any abortions except in the Leonard and Estill shipments. I only personally accompanied one lot of stock besides the Leonard and Estill shipments. I came over with the cattle from Scotland in the employment of Messrs. Leonard & Estill, and remained with them until the 15th of November."

At the close of the reading of the deposition the court announced its opinion as follows:

THE COURT: "I don't care to hear any further argument on the subject discussed before recess. My opinion is that if a railroad company receives a cow, or any other animal for transportation, that is with calf, and such animal is of greater value, at the point of destination, by virtue of her being in such condition, than she would otherwise be, and in the course of the journey, through the fault of the

carrier, the animal receives an injury that is the direct and immediate cause of her losing her calf, that is an item of damage that is recoverable from the carrier. It stands upon the same footing as an ordinary physical injury to the animal. Of course there may be some difficulty on both sides in proving or disproving the fact alleged, that a particular injury sustained led to the loss of calves, but the fact that there is difficulty in making the proof, don't alter the rule of law. The difficulty is one of fact, and not a difficulty in the law. I shall allow you to proceed on both sides and try that issue of fact."

Mr. Pollard (for defendant): "Is that, your Honor, without regard to the knowledge of the carrier?"

THE COURT: "*I don't think that has anything to do with it.* The carrier had a right to make any inquiry it saw fit before it received the property, as to the condition the cows were in, and to make its arrangements accordingly. If no inquiries were made, and the cattle were received, the rule stated applies."

III.

W. R. Estill testified (pp. 79–80): That three of their bulls were injured; one hurt in the testicles, never used as a breeder; the other two were crippled in the loins. Disposed of them the best way they could at a reduction. Witness says he thought he was acquainted with that kind of cattle at that time. He was then asked the following questions:

Ques. "I will ask, then, what would these three bulls have been worth if they had come home without any injury, in proper condition?" Ans. "$500 apeice."

Ques. "What, in your judgment, were they worth in the condition they did arrive?"

Counsel for defendant objected to the question as allowing the witness to assess the damages on the cattle.

THE COURT: "It is not necessary for him to assess

any damages. He is asked as an expert what the value of these bulls would have been without these injuries, and then they follow that with the question, what, in his opinion, the bulls were worth in the conditions in which they arrived. I don't know of any other way to arrive at the damages. Of course his answer is an opinion; the question of value is always an opinion. You may answer."

Ans. "Just what they would bring for beef. They would sell for from $25 to $50 a head for beef."

IV.

The same witness, W. R. Estill, having testified that he knew of five of the Estill cattle that aborted, and that they would have been worth $600 each if they had arrived in good condition, was asked the following questions (pp. 80–83):

Ques. "Mr. Estill, I want, if you know, to ask you how it affects a cow, for breeding purposes, that has aborted her calf."

Mr. Pollard: "I object to that."

THE COURT: "I think there should be some further proof that he is acquainted with that subject before he answers."

Mr. Cosgrove: "I ought to have done that—"

Ques. "Have you ever known of cows that have aborted their calves? Ans. "Yes, sir—"

Ques. "How much knowledge have you had on the subject?" Ans. "Have resided on a farm all my life—spent my active life on a farm. I believe I have seen from five to six or twelve abortions during a life-time.

Ques. Did you ever try to inform yourself as to the effect it has upon the breeding qualities?" Ans. "Yes, sir; by personal experience. There is no book by which I could inform myself as to the cause of abortions, but the effect of abortions I could inform myself somewhat by personal knowledge."

Ques. "Have you had any knowledge of abortions except those you have spoken of as having observed on your father's farm?" Ans. "No, sir; no other knowledge."

Ques. "How did the fact that these cows aborted their calves affect their market value?"

Mr. Pollard: "I think he must show he has some knowledge of that; he must show how he knows of the market value; he has to show whether he knows anything about it.

THE COURT: "He has already testified as to the market value of these cows without objection, provided they arrived uninjured."

Mr. Pollard: "He says he knows that."

THE COURT: "He may know what a cow is worth that has aborted its calf, that is all he is asked at present. You may answer the question."

Mr. Pollard (counsel for defendant): "There is another thing, this collision happened some five years ago; they are able to show exactly what the result was on those cattle, whether they turned out breeders; of course, it will depend on that; they may have turned out to be breeders, bred right along; they might have been barren; that is knowledge in their possession; they are able to show exactly the result of each abortion whether they turned out breeders."

THE COURT: "A cow that was received at that time, that was expected to have a calf within a month or two, might have a value with the witness, although not an expert on this other question, was acquainted with; whereas a cow not liable to have a calf that season might have another value that the witness also knows."

Mr. Pollard: The point I make is that they are able, should be able, to show exactly what the fact was, whether she did have a calf, or whether she continued barren."

THE COURT (to witness): If you are able to state

what the market value of these five cows you have referred to was, at the point of destination, in the condition in which they were received, their calves having been lost, you may state that. He is not called upon by this question to express any opinion as to the effect the loss of a calf will have on a cow's power of giving birth to calves thereafter. That is not the question.

Mr. Pollard: "It is all based on that. That is the real question; what is the real damage to that cow? If they are able to show exactly what the result was, now; we say that should be the testimony, and that should be the rule of damages. He says the original value of an aborted cow under those circumstances was $500 or $250. Suppose it turned out that that cow sold for just as much as a cow that never aborted, and they are in possession of that testimony. I say that is a fact they are bound to show; to procure the best testimony, and not speculative testimony. That is speculative. When they can show the actual facts—show what was the result of the abortion—whether she was a breeding cow after.

THE COURT: It is competent for you to establish all these facts in cross-examination.

Mr. Pollard: "The point I make is, they are bound to show the best evidence when they have the actual facts. They come here and want to show speculation when they can show exactly what the result was."

THE COURT: "I will let you show what the market value of these five cows was in the condition in which they were received." Ans. "$250 each." (p.83.)

V.

Hugh W. Elliott, one of the plaintiffs, who testified that he had no personal knowledge of any abortions in the herd, and who did not testify to any knowledge of the market value of aborted cows, was asked the following questions (pp. 118–119):

Ques. "Did you see those heifers, examine those particularly, notice them?" Ans. "No, sir; except it may be one or two in the barn."

Ques. "I mean as soon as you got able to get out?" Ans. "No, I did not."

Ques. "You saw them at Waltham, and at Concord?" Ans. "Yes, sir."

Ques. "Now if they had reached Estill in calf, that is, all right, and hadn't dropped calves, assuming they were in calf or with calf rather, what in your judgment, would they have been worth per head at that time?" Ans. "I suppose they would have been worth $550, anyway.

Ques. "A piece?" Ans. "Yes, sir."

Ques. "If any had aborted their calves what would they have been worth, in your judgment, in that condition?" Ans. "Well, my judgment then and my judgment now might differ a good deal."

Mr. Pollard: We make the same objection to that.

Mr. Cosgrove. (counsel for plaintiffs): "I want what your judgment now is as to their value then?" Ans. "My judgment now is that they would not be worth over a $100."

THE COURT: "You are speaking of their value at that time." Ans. "Yes, at that time."

Mr. Williams. "Judging by experience, results?" Ans. "Yes, sir."

THE COURT: Not that exactly, what was their market value? What as you think was their market value, not with calf, at that time, and at that place, if you know?" Ans. "I thought, at that time they were worth $200; but I would not hardly buy cattle that had aborted."

Ques. "As I understand you, your judgment at that time was they worth $200 a head?" Ans. "Yes."

Mr. Cosgrove. "The question I ask you—don't answer it before the court tells you—my question is what you now think those were then worth?"

Mr. Pollard. We object.

THE COURT: "I don't think that is the criterion. If a heifer with calf at that time and place had a certain market value it is competent for you to show it. If the same animal, not in calf, had a market value, at that time and place, it is competent for you to show that.

Mr. Cosgrove: "I think that is probably within the rule."

THE COURT: The question is the market value of the animal in the two conditions.

Mr. Pollard: That is the same thing we objected to before. It is not the correct rule of damages.

THE COURT overruled the objection and defendant excepted.

Mr. Cosgrove: What was the market value of those cows arriving in the condition in which they did arrive?

THE COURT: I understood him to say that at that time they were worth two hundred dollars a head, and had they arrived with calf they would have been worth five hundred and fifty dollars each.

Mr. Cosgrove: "He said his judgment was they would be worth, arriving in the condition they did, $200."

Witness: "My judgment at that time?"

VI.

Chas. E. Leonard, one of the plaintiffs, was asked the following questions (p. 135):

Ques. "I will ask you if you were acquainted, say in September and October, along there—the fall of 1883, with the market value of these black cattle in the markets of Missouri?" Ans. "I was at stock sales, I know how cattle sold."

Ques. "What in your judgment, would these heifers have been worth per head, had they arrived here in the same order and condition that they were in Concord when you saw them?" Ans. "Well, sir, I suppose they would have brought as much as $450 to $500."

Ques. "That is heifers?" Ans. "Yes, heifers."

Ques. "Heifers that were how old?" Ans. "These cattle, I think, were pretty much all of them two and three years of age. There were probably a few younger, but very few, that is, from eighteen months to three years of age."

Ques. "You think, then, that heifers ranging from eighteen months to three years were worth—"

Witness: "I will stay right at $500."

Ques. "What did you say?" Ans. "I will stay right at $500. I would suppose certainly between $450 and $500."

Ques. "Now, what would the same animals—heifers, cows, be worth if they had aborted these calves?" Ans. "About all the way I could answer that question would be the opinion of men who are buying fine stock, as I have heard them express it. Right in regard to this thing I have no experience. I never put up."

Ques. "I will ask you as a breeder of cattle, a man who has been handling cows, blooded stock all your life, what would have been the market value of such cows, if they had aborted their calves?"

Defendant objected to the question on the ground of incompetency; that the witness having no knowledge of the market value of aborted cows, was not competent to speak on the subject, and that the market value, if there was any, in such case was not the true rule of damages.

The Court: "I will let you establish, by this witness, the difference in the market value in that county, as between heifers or cows with calf, and those not in calf." Defendant excepted to the ruling of the court.

Ques. "Now, Captain, I will ask you what was the market value of these cows if when they reached here they had lost their calves?" Ans. "Not exceeding one-fourth of what their value would have been had they got here in proper condition; that would be my judgment."

VII.

Mr. Wm. M. Marshall, a witness who examined the Estill cattle on their arrival in Howard county, at the request of Estill and Elliott, for the purpose of appraising the damages, and who never saw the cattle before their arrival, speaking of the condition of the cattle at the time of their arrival, said, "My recollection of the bulls was that there were three of them in a very bad fix. One of them, his testicles was badly swollen—bruised. Two of them could hardly get off the train. They were assisted by four hands. They seemed to be broken down in the loins. They just dragged their hind parts." * * * Witness was shown a paper, but being unable to identify it, he was asked the following questions (pp. 154–155):

Ques. (by Mr. Williams, counsel for plaintiffs): "What was your judgment, independent of any paper, what were these bulls worth? What was their market value, these three you say were broken down in the loins at the time they arrived at Estill; just from recollection, now, what were they worth?"

Mr. Pollard: "We object."

THE COURT: "That is you mean to ask what was the depreciation in their market value by reason of the injuries he observed."

Mr. Williams: "My purpose is to show what they were worth in the condition they arrived. I would as soon ask it the other way."

THE COURT: "I want to understand the meaning of your question."

Mr. Williams: "The purpose is to ask what they were worth in the condition they arrived at Estill, with the view of fixing what the damage was."

THE COURT: "You may answer that question."

Mr. Pollard: "That is the very question we object to. He never saw the cattle before. It is allowing him to

assess the damages, which we say is a question for the jury. We insist all it is competent for him to do is to state the nature of the injuries, and the condition of the cattle as they came off the train."

THE COURT: "I don't think that objection is tenable. A party observes certain physical injuries; he is asked what the value of the animal was without those injuries, and what the value of the animal was in its injured condition. It is, of course, incumbent on the plaintiff to show that whatever injury the witness saw was occasioned by some fault of the defendant. It is not necessary, however, that they should establish it by this particular witness."

Mr Pollard: "I don't claim that. I claim it is not competent for him to state the value of the injuries or the amount of the injuries."

THE COURT: "I overrule this objection." To which overruling defendant excepted.

Ques. "What, in your judgment, were these animals worth in the condition you saw them at Estill, at the time they arrived?" Ans. "Those three bulls?"

Ques. "Yes." Ans. "They were worth comparatively nothing."

Ques. "Have you any knowledge as to their value?"

THE COURT: "Give us your opinion?" Ans. "My opinion would be they would be worth nothing. I am honest in it. They were very hollow; they didn't appear to be fit for service—not fit for beef. Ten or fifteen or twenty dollars would be a fair value."

Ques. "What would they have been worth had they arrived in good order and condition." Counsel for *defendant objects.*

THE COURT: "You may answer."

Ruling excepted to.

Ans. "From $500 to $600 cash is what they were selling at."

VIII.

John H. Turner, a witness for plaintiff, a farmer and stock dealer, but who had never seen the cattle in controversy, was asked the following questions (p. 174):

Ques. (by plaintiffs' counsel). "I will ask you if you were acquainted with the value of black cattle in that vicinity (Howard county, Mo.,) in the fall of 1883?" Ans. "Yes, I think I was."

Ques. "Did you see these particular cattle?" Ans. "No, sir."

Ques. "Of Estill and Elliott?" Ans. "I didn't see them."

Ques. "I will ask you what effect, if any, the fact that a cow had aborted its calf, would have upon the market value of it, if any?"

Mr. Pollard: "We object."

THE COURT: "You refer to this particular kind of cattle?"

Mr. Williams: "Yes."

THE COURT: "And to this place?"

Mr. Williams: "Yes; I will change the question. State, in your judgment, what would be the effect upon the market value of one of those black heifers by reason of its having lost its calf through abortion produced by violence, in 1883, in Howard county, Missouri?"

Mr. Pollard: "We object. I think independent of his knowledge of these cattle, it is an expert question."

THE COURT: "I will let him answer that question in this form."

Defendant objected to the ruling of the court.

Ans. "The difference would be the value as beef and as breeders. It would have been in the year 1883 somewhere in the neighborhood of four cents for beef purposes and $500 for breeding purposes, on that class of cattle."

A great deal of testimony was introduced under the above rulings of the court, but the above is sufficient to present the questions sought to be raised.

The following portions of the judge's charge to the jury and the refusal of the court to give an instruction asked by defendant are alleged, and will be relied on, as errors, viz:

IX.

1st. "Having received the cattle for the purposes of transportation, the defendant was bound in law to deliver the respective herds of cattle at the terminus of its line in as good condition as it received the same."

To which the defendant then excepted.

X.

2d. "The law is that if a carrier receives property for transporation and delivers it at the end of its route, but, through its fault, it is damaged, and it fails to deliver it in the same condition as when received, it must pay the difference between the value of the property in its damaged condition at the point of destination and what the value of the property would have been at the place if delivered in the same condition as when it was received for transportation. These are the general rules of law which must be applied in the assessment of damages in the two cases on trial."

To which ruling the defendant at the time excepted.

XI.

3d. "The testimony tends to show that seven head of the Leonard Bros.' cattle—that is, five heifers and two bulls—were left at Nankin, Ohio, where the collision occurred, either killed or very badly hurt, and were never

delivered at the point of destination or at the end of defendant's line. If you find such to be the fact, you will allow the Leonard Bros. for those seven head their market value as shown by the evidence at the point of destination in Saline county at the time they should have arrived."

To which the defendant at the time objected.

XII.

4th. "In the first place, it is contended by the Leonard brothers that some of the cattle in question died after they reached the point of destination of injuries received in the collision at Nankin, Ohio. Abiel Leonard claims that three Galloway bulls died from such cause on his farm. William H. Leonard claims that three heifers died from such cause on his farm, and Leverett Leonard says that seven heifers died on his place after their arrival. Now, if the evidence in the case satisfies you that any of the cattle did die as stated by these witnesses and that their death was the direct result of injuries sustained in the collision, then you will allow the Leonard brothers the market value in Saline county, as shown by the testimony, of the cattle that so died."

To the giving of which defendant at the time excepted.

XIII.

5th. "In the second place, it is claimed by the Leonard brothers that some other cattle received injuries of various kinds by the collision, which did not terminate fatally, but nevertheless lessened the market value of the cattle so injured. The class of injuries to which I now refer are strains, bruises, etc., which some of the cattle are said to have received. The plaintiffs themselves and Dr. Glover and Judge Sparks have spoken generally of about forty-eight head that are said to have received injuries, including, no doubt, the thirteen head that are said to have afterwards died. Dr. Glover and Judge Sparks say that

they found twenty-five or thirty head of injured cows and heifers among the Leonard cattle and five or six injured bulls. The plaintiffs themselves "that is, the Leonards" make the number of injured bulls somewhat greater. Abiel Leonard says that he had five injured bulls in his portion of the herd. William H. Leonard said that he had five injured bulls in his herd. Leverett Leonard said that he had two bulls broken down in the back and loins and eight others that were unserviceable for a year or more. You will recall their testimony on this branch of the case. I call your attention to all of this testimony for the purpose of saying that you should weigh it very carefully and determine how many cattle, if any, received injuries by the collision of the character last described, and to what extent, if any, such injuries lessened their market value at the time of their arrival in Saline county. If you are satisfied by the evidence that any of the cattle received injuries, such as strains, bruises, etc., which rendered them less valuable in the market at the point of destination than they would have been but for such injuries, then you will allow the Leonard brothers on that account such sum as in your judgment as reasonable men, under all the evidence, will make good such depreciation in their value."

To the giving of which defendant at the time excepted.

XIV.

6th. "In the third place, it is claimed that certain cows and heifers that where with calf at the time of the collision lost their calves, and damages are claimed on that account. There is evidence tending to show that about 94 or 95 head of the Leonard brothers' cattle lost their calves after the collision. Abiel Leonard says 25 head lost their calves on his place. William H. Leonard says 27 head lost their calves on his place, and Leverett Leonard says that 43 head lost their calves on his farm. Now, with reference to this matter I will say that if the Leonard

brothers have satisfied you by the evidence that any cows or heifers that were with calf when the collision occurred, as the direct and immediate result of that collision, lost their calves, and that such premature casting of their calves made the animals less valuable in the market than they would have been but for such loss of their calves, then they are entitled to recover the amount of depreciation in the value of any of the animals that so lost their calves."

To the giving of which defendant at the time excepted.

XV.

7. "Now, in the Estill and Elliott case there is evidence tending to show that five of the Estill and Elliott cows aborted their calves before they reached Estill, that is, while they were in transit; that four or five cows aborted their calves prior to October 26, 1883, when the herd was taken to Kansas City, or part of it was taken there, and that two cows aborted their calves afterwards, making eleven, twelve, or perhaps thirteen cows in all in the Estill and Elliott herd that it is claimed aborted their calves.

Now, with reference to these two kinds or species of injuries claimed to have been sustained by the Estill and Elliott cattle, I instruct you the same as before; that if the evidence shows to your satisfaction that any of the animals sustained such injuries as the immediate result of the collision, and that the injuries so sustained lessened the market value of the stock so injured at the point of destination, then you will be authorized to allow Estill and Elliott such reasonable sum as in your opinion, under the evidence, will make good the depreciation in the value of any of the animals you find to have been injured, either by strains or bruises or by the premature casting of their calves."

To the giving of which defendant at the time excepted.

XVI.

8th. "Now, in the light of the testimony, both for the plaintiffs and for the defendants, to which I have just al-

luded, and in the light of any testimony in the case which you recall, and bearing in mind that the burden of proof is on the plaintiff to show that the cattle in question received injuries, and the result and extent of such injuries, you will have to determine the following important questions of fact, viz:

First. How many cattle in each herd were injured in any manner, in consequence of the collision, to such an extent as to lessen their market value at the point of destination?

Second. How many of the Leonard brothers' cattle were killed or badly injured and left at Nankin, Ohio, in consequence of the collision, and what would have been the value of such cattle in Saline county, at the time they should have arrived, if they had been delivered in the condition in which defendant received them?

Third. How many of the Leonard brothers' cattle, if any, died of injuries received in the collision after they had been delivered to the Leonard brothers, and what was the reasonable market value in Saline county of those cattle if they had arrived uninjured?

Fourth. How many animals in each herd lost their calves as the direct result of the collision, and to what extent did such loss of their calves lessen their market value at the point of destination? and

Fifth. What number of cattle in each herd besides those that are said to have died or lost their calves, or were otherwise injured by the collision, as by strains or bruises, so as to materially lessen their market value, and what was the amount of such depreciation of value?"

To the giving of which and to each one of the above five propositions the defendant at the time excepted.

XVII.

9th. "The question as to what causes led some of the cattle in these two herds to lose their calves or to die

after arrival in Saline county is a question on which you may find some difficulty in solving, as in the nature of things these questions do not admit of solution by positive or direct proof. I can only say you must apply your best judgment and your experience to the solution of these questions, giving to all testimony, including that of the experts, such weight as you think it fairly deserves."

To the giving of which defendant at the time excepted.

XVIII.

10th. "When you have assessed the damages in each case, you may compute interest on the damages in each case at six per cent. per annum from the time the suits were brought (that is, November 21, 1883, in the Estill case, and November 27, 1883, in the Leonard case) to this day; and I will further direct you to State in your verdict, separately, the amount of interest which you award or may award in each case."

To the giving of which defendant at the time accepted.

XIX.

Defendant asked the court to give the following instruction:

6. "The court instructs the jury that unless the defendant knew that some of the cattle of plaintiffs were cows or heifers in calf plaintiffs are not entitled to recover for abortions, though they may have been caused by the wreck, as in that event damages on account of abortion could not have been in the contemplation of defendant at the time the cattle were received."

No. (6) refused. A. M. Thayer.

Which the court refused; to the action of the court in refusing said instruction defendant at the time excepted.

ARGUMENT.

I.

The court below erred in overruling defendant's motion to quash the writs issued by the clerk of the Circuit Court of Saline county to the sheriff of the City of St. Louis, and the returns of said sheriff thereon. The first question presented under this head is: Did the fact that defendant, at the time of the alleged service in these cases, had a business office in the City of St. Louis, and an agent therein, make it a *resident* of the State of Missouri, within the meaning of the statutes of said State regulating the subject of jurisdition and the service of process. If so, then the writs and service gave the Circuit Court of Saline county no jurisdiction over the defendant. The statutes of Missouri, bearing upon this subject, in force at the time these suits were brought, and the writs served, are as follows: Clause two of section 398, Art. I., Chapt. 6, p. 62, Vol. 1, Rev. Stat. of 1879, entitled "Attachment," provides that attachments may issue, "where the defendant is a corporation whose chief office or place of business is out of this State." Section 415 of same chapter provides that the attachment writ in addition to the direction to attach property, etc., "shall contain a summons to the defendant, of the nature and effect of an ordinary summons to appear and answer the action of the plaintiff."

Section 420, clause one: "The writ and petition shall be served upon the defendant, as an ordinary summons." Section 433: "When the defendant has been served with the writ, or appears to the action, the proceedings in the cause shall be the same as in actions instituted by summons only."

Article III., Chapt. 59, p. 594, Vol. 1, Rev. Stat. of Mo., 1879, entitled "Of the Place of Bringing Suits," provides, Section 3481:

"Suits instituted by summons shall, except as other-

wise provided by law, be brought: First. When the defendant is a resident of the State, either in the county within which the defendant resides, or in the county which the plaintiff resides, and the defendant may be found. Second. When there are several defendants, and they reside in different counties, the suit may be brought in any such county. Third. When there are several defendants, some residents and others non-residents of the State, suit may be brought in any county in which any defendant resides. Fourth. When all the defendants are non-residents of the State, suit may be brought in any county. Fifth. Any action, local or transitory, in which any county shall be plaintiff, may be commenced and prosecuted to final judgment in the county in which the defendant or defendants reside, or in the county suing, and where the defendants or one of them may be found." (Sec. 3482.) "Suits commenced by attachment against the property of a person, shall be brought in the county in which such property may be found."

Sec. 750, Chapter 21, p. 124, Rev. Stat. 1879, entitled "Corporations," provides, that "suits against corporations shall be commenced either in the county where the cause of action accrued, or in any county where such corporation shall have, or usually keep an office or agent for the transaction of their usual and customary business."

Sec. 3497, Chapter 59, Rev. Stat. 1879, p. 598, provides that, "all railroad corporations that own or operate roads terminating opposite to any point in this State, and which have offices or places of business in this State, shall be sued in the same manner as railroad corporations chartered by this State." (As amended in 1877, Sess. Acts p. 369, Sec. 1.)

Section 3489, Chapter 59, p. 596, Rev. Stat. 1879, entitled "Writs, how served on persons and foreign corporations," provides—"A summons shall be executed except as otherwise provided by law, either * * *

Fourth: Where the defendant is a corporation or joint stock company, organized under the laws of any other State or county, and having an office or doing business in this State, by delivering a copy of the writ and petition to any officer or agent of such corporation or company, in charge of any office or place of business, or if it have no office or place of business, then to any officer, agent or employee in any county where such service may be obtained."

The history of legislation in Missouri, on the subject of suits against foreign corporations is as follows: Prior to the year 1859, there was no statute authorizing such suits by summons in any case. In that year an act was passed, providing that "all railroad corporations that own and operate roads terminating opposite the City of St. Louis, and whose chief office or place of business is in said city, shall be sued in the same manner as railroad corporations chartered in this State, and not otherwise."

In 1877 (Sess. Acts, p. 399), the above section was changed and extended so as to include all corporations owning or operating roads terminating "opposite to any point in this State," instead of "opposite the City of St. Louis." This amendment of 1877 is the same as section 3497, Rev. Stat. of 1879, above quoted and is now in force.

Paragraph four of section 3489, Chapt. 59, Rev. Stat. 1879, quoted above, extended the jurisdiction to corporations and joint stock companies, organized under the laws of any other State or country, and "having an office or doing business in this State."

An act approved March 26, 1881, Session Acts of 1881, p. 173, declares: "Section 1. That the fourth paragraph of section 3489 of the Revised Statutes, means and shall be construed to mean, that service had, as provided by said paragraph, upon the party or parties therein named, has and shall have the effect of personal service, and it shall be as effectual as though the same was served on the principal; and the courts of this State shall have the same

right and power to enter a general judgment against the defendant or defendants, as if they were created by the laws of this State."

The City of St. Louis is a political subdivision of the State, having a sheriff of its own, and is treated as a county of the State.

Section 5271, Rev. Stat. 1879; Sec. 1, Art. 4, Scheme and Charter, p. 1590, Vol. 2, Rev. Stat. 1879.

The declarations allege that defendant was a railroad corporation, engaged in running and operating a railroad through the States of New York and Ohio, and that the cause of action accrued in the State of Ohio. The affidavits in support of the attachments state that "defendant is a corporation incorporated by a State other than the State of Missouri, whose chief office or place of business is out of this State." The returns on the writs show that no property was attached, and that the only service had on defendant was that made by the sheriff of the City of St. Louis, on Connor, its city passenger agent, in the business office of the defendant in that city.

The contention of plaintiffs below, was that defendant was a non-resident of the State, and that the case was within clause four of Section 3481, Rev. Stat., 1879, which provides, that "when all the defendants are non-residents of the State, suit may be brought in any county."

Plaintiff in error insists that it was a resident of the State, and of the City of St. Louis, by virtue of the fact that it had a business office—and an agent in said city; that the case is governed by the first clause of said Section 3481, which provides that a suit by summons shall be brought "when defendant is a resident of the State, either in the county within which the defendant resides, or the county within which the plaintiff resides, and the defendant may be found."

The question then, is, *was the plaintiff in error, at*

the time of service, a resident of Missouri within the meaning of the statutes regulating the place of bringing suits, and the service of process." If so, these suits could only have been brought in the City of St. Louis where its business office was located, as appears by the record.

The Supreme Court of Missouri, has uniformly held, under the different statutes above set out in relation to foreign corporations, that corporations to which those several acts applied, that is, foreign corporations "having their general offices," "offices or places of business," or "having offices and doing business" in the State, are residents of the State, and of the county or city, within which such offices were located; and are governed by the same laws as to suits, and the service of process, as domestic corporations, or other residents of the State.

Farnsworth v. T. H. & St. L. R. R. Co., 29 Mo. 75, was an attachment suit against the railroad company, based on the allegation that it was a non-resident of the State, but it appeared that it had its chief offices in the City of St. Louis, and it was held on that ground that the attachment would not lie. On this point the court say (p. 78): "Where the foreign corporation has located here, and has its chief office or place of business here, it seems no longer to be regarded as a foreign corporation. It may be sued as an individual resident here. The president, secretary, etc., are, of course here, or such officers as, under our statute, would enable a suit to be brought, and service to be had, and there is no necessity for giving the extraordinary process of attachment against it, any more than against a domestic corporation whose chief office is here. Having its chief office here, it ceases to be for all the purposes of this law, a foreign corporation."

In St. Louis v. Wiggins Ferry Co., 40 Mo. 580, the above case was cited and approved.

Robb v. Chicago & Alton R. R. Co., 47 Mo. p., 540, was an action brought in the St. Louis Circuit Court to re-

cover damages for negligently running its train against plaintiff's wagon and horse in Illinois. The petition alleges that defendant was incorporated under the laws of Illinois; that it operated a railroad terminating opposite the city of St. Louis, and that its chief office or place of business was in that city. The proof, however, showed that the chief office of the company was in Chicago. The court, after citing the above cases of Farnsworth v. T. H. & St. L. Ry. Co., and St. Louis v. Wiggins Ferry Co., *supra*, said: "The statute, we think, is plain, and there can be no doubt as to its meaning, but the above citations have been made to show the uniform construction placed upon it by this court. Where the road terminates opposite the City of St. Louis, and it has its chief office for the transaction of business here, then the law regards it as a domestic corporation and amenable to the jurisdiction of our courts by the ordinary process of summons."

Middough v. St. J. & D. R. R. Co., 51 Mo. 520, cites all of the above cases with approval, and reiterates the doctrine there laid down. The foregoing cases were decided under the old law which provided for suits by summons against foreign corporations only when they had their chief office here.

McNichol v. The U. S. Mercantile Rept. Agency, 74 Mo., 457, was the first case in which the Supreme Court was called upon to construe section 3489 (R. S. 1879). The court, in this case, goes over the entire history of the legislation in the State on the subject of suits against foreign corporations, with the decisions construing the same, and holds that under that section, when a foreign corporation has a business office in the State it becomes a resident of the State for the purposes of service by summons.

In Harding v. C. & A. R. R. Co., 80 Mo. 659, defendant was a corporation organized under the laws of the State of Illinois, having its general office in Chicago, in that State; but it had a business office in Kansas City, Mo.,

with an agent therein whose business it was to solicit freight and perform other services for the company. It was held that such office and agent in Kansas City made the defendant a resident of the State of Missouri and of Kansas City. The question of residence was the only question in issue in this case.

In Slaven v. Railroad Co., 51 Mo. 308, and Crutsinger v. Mo. Pac. R. R. Co., 82 Mo. 64, the Supreme Court apply the same doctrine to domestic railroads, holding that they are residents of any county in which they have an office.

Under these decisions plaintiff in error was, at the time of the service in question, a resident of the State of Missouri and of the City of St. Louis. Being a resident of the State it was entitled to the right and privilege conferred by the statute on other residents of the State, to-wit, *of defending itself against suits by summons at the place of its residence.*

Being a resident of St. Louis and entitled to be sued there, the service on defendant in these cases gave the Circuit Court of Saline county no jurisdiction over it.

Bracket v. Bracket, 61 Mo. 221.

Defendants in error, to sustain their view of the question, rely on the case of Stone v. Travellers' Ins. Co., 78 Mo. 655. That was a suit against a foreign insurance company, and the decision of the court was based on section 6013 Rev. Stat. of 1879, which requires such companies, as a condition of doing business in this State, to appoint a State agent, on whom service of summons may be made in all suits against the company appointing him; and the section expressly provides that suits may be brought in any county in the State, and service had upon such agent.

It is true that, after having decided the case correctly on the above section of the insurance act, under which the suit was brought, the court goes on to say: "In the ase of Baile v. the Equitable Insurance Company, 68 Mo.

617, it was held that the mode of suing a foreign insurance company not domesticated here, by reason of having its chief office or place of business in this State, provided by the foregoing section of the insurance law, is exclusive of all other modes of service. The defendant being a non-resident of the State was subject to suit in any county in the State (R. S. Sec. 3481), and could be personally served in the manner pointed out by that section." This reference to the Baile case and to section 3481 of the Rev. Stat. was entirely unnecessary to the decision of the case before the court, and what is there said is therefore not entitled to the weight of an authority.

The Baile case, referred to, in support of what is said above, was instituted in the Circuit Court of Johnston county in 1874; summons was issued to the sheriff of that county and served on an agent of defendant at his office in that county. Defendant was a foreign insurance company having an agent in the State appointed under the statute for the purpose of receiving service, but who was not the person on whom service was made. The *chief office* of defendant was in Nashville, Tennessee. The court held that the service was not good because the chief office of defendant being out of the State it was a non-resident, and therefore could not be brought into court by the writ of summons unless it was served on the State agent, as provided by the insurance act. Citing the case of Middough v. The St. Joseph and D. City R. R. Co. 51 Mo., 520, above cited and relied on by plaintiff in error. Both the Baile and the Middough cases were decided under the old law, which required a foreign corporation to have its chief office in this State in order to make it a resident, and subject to a suit by summons.

The case of Harding v. Chicago & Alton R. R. Co., *supra*, was decided after the case of Stone v. Travellers' Ins. Co.

The only question in that case was whether a foreign corporation having its chief office and place of business in another State became a resident of this State by having *a business office and an agent here*, and the court held that it did. This is the latest expression of the Supreme Court of the State on this question, and it is in harmony with all former decisions. The test that has always been applied, in all the cases, to determine whether or not a foreign corporation was a resident of the State, is, has it brought itself within the provisions of the several statutes, by having its "general offices" here, or by having "an office and an agent" here, so as to be amenable to the jurisdiction of our courts by the common process of summons and whenever it has been found that a foreign corporation had such an office here, it has been held to be a resident of the State, and entitled to be sued as other resident defendants.

2. If the service was illegal, and conferred no jurisdiction on the Circuit Court of Saline county over defendant, it did not waive the right to object to such service by entering a limited appearance in that court for the purpose of removing the cases into the Federal court. If the cases were removable, defendant had the right to have every question arising in them decided in the Federal court.

In Duncan v. Gegan, 101 S. C. 810, this court says: "The Circuit Court, when a transfer is effected, takes the case in the condition it was when the State court was deprived of its jurisdiction." * * "It takes the case up where the State court left it."

That the right to object to the jurisdiction was not waived by entering a limited appearance and removing the cases is fully sustained by the following decisions:

Parrott v. Ala. Gold Gold Life Ins. Co., 5 Fed. Rept. 391;

Blair v. Turtle, 5 Fed. Rept. 394;

Wertlein v. Continental Ry. and Trust Co., 11 Fed. Rept. 689;
Atchison v. Morris, 11 Fed. Rept. 582;
Kauffman v. Kennedy, 25 Fed. Rept. 785;
Small v. Montgomery, 17 Fed. Rept. 865;
Hendrickson v. C., R. I. & P. R. Co., 22 Fed. Rept. 569;
Reifsnider v. Am. Imp. Pub. Co., 45 Fed. Rept. 433.

Plaintiffs below insisted that the right to object to the jurisdiction of the State court was waived by the appearance there for the purpose of removal, although the appearance was *special* and limited to that purpose; and to support this view they cited and relied upon the following authorities:

Sayles v. Northwest. Ins. Co., 2 Curtis C. C. 212;
Deakin v. De. 11 Biss. 27;
Edwards v. Conn. Mut. Ins. Co., 20 Fed Rept. 452;
In re Receivership of Iowa & Minn. Co., 6 Fed. Rept. 799;
West v. Aurora City, 6 Wall. 139;
Bushnell v. Kennedy, 9 Wall. 387;
Schwab v. Mably, 47 Mich. 512.

And as we presume they will be relied on here we will, as briefly as possible, refer to them in detail.

Sales v. Northwestern Ins. Co., was a suit commenced in the State court in attachment. There was no personal service, defendant being a non-resident, was brought in by publication. The State Court had undoubted jurisdiction over this case by virtue of the levy of the attachment, so far as to render a judgment binding upon the property attached, but the Federal courts had no jurisdiction over suits in foreign attachment unless personal service on defendant could be had in the district. In this condition of the case, the defendant voluntarily appeared in the State Court, filed his petition for removal,

took the case to the Federal Court, entered his appearance there, and moved to *dismiss the suit*, not on the ground of any defective service in the State Court, or for the reason that the State Court had not acquired complete jurisdiction over the cause, but on the ground that the Federal Court into which he had removed the case, had no jurisdiction over it, and could not hear it, because it would not have had jurisdiction if the case had been originally brought there. Judge Curtis held that, as the controversy was between citizens of different States, the Federal court had jurisdiction of the case, and as the defendant had voluntarily appeared and removed the cause from the State Court, which clearly had jurisdiction, he was not entitled to have the cause dismissed in the Federal Court, to which he had voluntarily taken it. The real question in the case, says Judge Curtis, is "whether the case was rightfully removed. If it was, the motion to dismiss must be overruled; if it was not the action must be remanded to the State Court." All that was said on the subject of appearance in the State Court was *obiter dictum*, and unnecessary to the decision of the case. This case was decided under the Act of 1789, which required the defendant to enter his appearance in the State Court before he could apply for a removal. A general appearance under that act has been considered, and was in the above case, as equivalent to a plea to the merits of the action. No court, so far as we know, has expressed an opinion as to what would have been the effect of a special appearance under the Act of 1789. It is the effect of a special appearance under the Act of 1875 which this court is passing upon.

The case of Deakin v. Lea 11 Biss. was twice before the court; first on a motion to remand, which appears on page 27, and again on a demurrer, which appears on page 34, which is the reference which plaintiffs have given us. In neither case was the question of the effect of defendant's appearance in the State Court decided, as the judge

said that was unnecessary to a disposition of the case. The suit was brought in the State Court against three defendants, only one of whom was served with process. Lea and Perrin, the two defendants who were not served, voluntarily entered their appearance in the State Court and filed their petition for removal. When the case reached the Federal Court the plaintiffs moved to remand. On this motion, and in the hearing on the demurrer, Lea and Perrin claimed that they were not parties defendant in the Federal Court, as they had entered their appearance in the State Court only for the purpose of removing the cause. Whilst Judge Drummond on both hearings expressed the opinion that the voluntary appearance of these defendants in the State Court subjected them to the jurisdiction of the Federal Court, he said he did not decide the question, as it was unnecessary in the view which he took of the case. This case was heard on the motion to remand in April, 1882. It is evident that Judge Drummond did not consider what he said in this case in conflict with his decision in the case of Atchison v. Morris, 11 Fed. Rep. 582, decided only a month before, as he made no reference to that case. The questions involved in the two cases were not the same.

In the case of Edwards v. Connecticut Mutual Insurance Co., 20 Fed. Rep. 452, the decision, so far as it bears upon the question of the effect of the appearance in the State Court, is based on the old case of Sayles v. N. W. Insurance Co., 2 Curtis, 212, which we have already considered. There was no question of service involved. The defendant moved in the Federal Court to dismiss the cause. There was no question made as to the manner in which defendant was brought into the State Court. It was conceded that it was properly before it. We do not think this case is in point.

In re Receivership of Iowa and Minn. Construction Company, was an intervening petition filed in a cause which

had been pending in a State court of Iowa for three years. Immediately on filing the petition, and without issuing or serving process of any kind, the petitioners filed an application for a removal of the case to the Federal Court. The defendants appeared in the Federal Court and moved to remand. The sole question was whether the mere filing of a petition under the State practice, in the State Court, without the issuing or service of process or notice of any kind, on defendants, constituted a "suit" within the meaning of the removal act. The Iowa code provided that "*actions*" in a court of record shall be commenced by serving the defendant with a notice, signed by the plaintiff, or his attorney, informing the defendant of the name of the plaintiff, and that on or before a date therein named a petition will be filed," etc. Judge McCrary held that the word "*action*" in the statute of Iowa was identical with the word "*suit*" in the Act of Congress, and that, in the Iowa practice, the mere filing of the petition without notice or process, did not constitute a pending suit in the State Court, and could not, therefore, be removed. It is difficult to see what application this decision has to the present case.

West v. Aurora City, 6 Wall. 139, was a suit brought in one of the State courts of Indiana by West and Torrence, citizens of Ohio, against the City of Aurora, in Indiana, to recover on certain bonds of that city. In this suit the defendant appeared and answered under the code, and subsequently filed an additional answer, setting up new defensive matter, and asking an injunction to restrain the plaintiff from further proceeding in any suit upon the bonds or coupons, and for a decree that they be delivered up to be cancelled. Upon the filing of this answer, the plaintiffs entered a discontinuance of their suits, and assuming that, under the code or State practice, this affirmative matter in the answer would remain as a new suit against them, filed their petition for the removal of the case to the Circuit

Court of the United States, which was allowed by the State court, and the answer of defendants, without any other portion of the record of the suit except its title and the entry of the discontinuance, were sent into the Circuit Court. By that court they were remanded to the State Court as not constituting a suit that could be removed under the twelfth section of the Judiciary Act of 1789. The plaintiffs carried the case to the Supreme Court which affirmed the decision. The Judiciary Act of 1789 did not authorize a plaintiff who had brought his suit in a State Court to remove it to a Federal Court, although he was a citizen of a different State from that in which the suit was brought; this was a right granted to a non-resident only. West and Torrance, the plaintiffs in this suit, were citizens of Ohio, and they commenced their suit in a State Court of Indiana, against a citizen of that State. The Supreme Court held that another fatal objection to the right of removal was that the record presented only a fragment of the cause. In the conclusion of the opinion the court say that "a suit removable from a State Court must be a suit regularly commenced by a citizen of the State in which the suit is brought, by process served upon a defendant who is a citizen of another State, and who, if he does not elect to remove, is bound to submit to the jurisdiction of the State Court." If this language was intended to apply to any other case than the one then before the court, it can only mean that a defendant must be served with process in a case in the State Court before he is authorized to apply for a removal. This must be upon the ground that until there is service on the defendant there is no suit pending.

Whether a suit is pending or not in the State Court must depend upon the law of the State. Section 3485, Chap. 59, Rev. Stat. of Missouri, 1879, provides as follows: "Suits may be instituted in courts of record, except when the statute law of the State otherwise provides, either: First, by filing in the office of the

clerk of the proper court a petition setting forth the plaintiff's cause or causes of action, and the remedy sought, and by the voluntary appearance of the adverse party thereto; or second, by filing such petition in such office, and suing out thereon a writ of summons against the person, or of attachment against the property of the defendant." Where this is done the suit is "Commenced" in the State court. The language of the Judiciary Act was, "That if a suit be commenced in any State Court," etc., and the defendant at the time of entering his appearance file his petition, etc., it shall be removed. This case does not seem to bear upon the question now before this court.

In Bushnell v. Kennedy, the question was whether under the 12th section of the Judiciary Act, a case could be removed from the State to the Federal Court, of which that court would not have jurisdiction, if originally commenced there.

The question in that case was, not whether the State Court had rightfully acquired jurisdiction over the defendant. It was conceded that, before the removal, the State Court had complete jurisdiction over the defendant, and the subject-matter of the suit. The defend ant, being properly in the State Court, removed the cause to the United States Court, and then moved to dismiss the case on the ground that the United States Court had no jurisdiction over the subject-matter of the action, which was a suit by an assignee upon an assigned claim, on which the assignor could not have sued originally in the United States Court. The question presented here was not involved, and was not decided in that case.

The case of Schwab v. Mably, so far as it bears on this question, is in our favor. The syllabus is as follows: "A petition for the removal of a cause to the Federal Court in which defendants not served with process unite, is not, as to such defendants, a general appearance in the State Court," and it was held that such an appearance

did not give the State Court jurisdiction over such defendants on overruling the petition for removal.

We have now referred to all the cases relied on by plaintiffs below, and feel assured that none of them will be found, when carefully examined, to be in conflict with those cited by us.

When the Circuit Court of the United States overruled defendant's objection to the writs and service, the defendant duly excepted to the ruling, and at the time, preserved its exception by a bill of exceptions, after which it filed answers to the petitions, and went to trial on the merits. It was insisted below, and we presume will be here, that by answering over and going to trial, plaintiff in in error waived or abandoned its right to question the jurisdiction of the court over; that in order to have saved its right to raise that question here, it should have abandoned the suits when its motion was overruled in the Circuit Court.

We insist that this question has been decided by this court in the case of Harkness v. Hyde, 98 U. S. Sup. Ct. 476. In that case, as in this, the defendant was served at a place where the court issuing the writ had no jurisdiction over him. He appeared specially and moved to dismiss the suit. This motion being overruled, defendant excepted to the ruling of the court, filed an answer, and went to trial on the merits. The jury found a verdict against him, on which judgment was rendered. He appealed to the Supreme Court of the Territory, where the judgment was affirmed. He then brought the case to this court, where he alleged as error the refusal of the lower court to dismiss the action for want of jurisdiction. This court held that defendant was served at a point beyond the territorial jurisdiction of the court issuing the writ, and that the service imposed no obligation on him to appear, and that the lower court should have set the service aside on its attention being called to the facts. On the question

of waiving defendant's rights by pleading over and going to trial, after the court had overruled his motion to dismiss, the court say:

"The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground, or what we consider as intended, that the service be set aside, nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling attention of the court to the irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby *compelled to answer*."

"He is not considered as abandoning the objection because he does not submit to further proceedings without contestation. *It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived.*"

If, as we have insisted, the defendant, at the time of the service, was a resident of the City of St. Louis, by virtue of its having a business office and an agent there, it was as completely beyond the jurisdiction of the Circuit Court of Saline county, as *Harkness* was beyond the jurisdiction of the district court of *Oneida county* when served at his place of residence in the Indian reservation.

The Supreme Court of Missouri has repeatedly held that the service of a summons in such a case is void, and confers no jurisdiction on the court from which it is issued.

Brackett v. Brackett, 61 Mo. 221;
Fare v. Gunter, 82 Mo. 522;
Perry v. Harper, 42 Mo. 131.

It was claimed on the hearing of the motion for a new trial, that the question as to whether the right to object to the jurisdiction of the court over defendant was waived by

pleading to the merits and going to trial, must be determined by the practice in the State courts, and that according to that practice the right to object was so waived; and the cases of Kronski v. Mo. Pac. R. R. Co., 77 Mo. 362, and Scovill v. Glasner, 79 Mo. 454, were relied on to establish such practice. In both of these cases the defendant was properly served with process and was in court. In Scovill v. Glasner, the court held that the defendant, by answering an amended petition, waived his right to insist on a motion to strike it out. There was no question of jurisdiction involved.

Kronski v. Mo. Pac. R. R. Co., 77 Mo. 362, was a case originating before a justice of the peace. Defendant filed in the Circuit Court a motion to dismiss the suit on this ground alone: "Because the justice did not have, nor has this court, jurisdiction of the defendant." The point insisted on in the Supreme Court was that "the return of the constable did not give the court jurisdiction over defendant;" and the court say that it is not clear that this specific objection was raised below. The defendant in this case resided within the territorial jurisdiction of the justice issuing the summons, and by the act of appealing from the judgment of the justice, it deprived itself of the right to question the service, as section 3052, Rev. Stat. of 1879, provided that on appeals from justice the case shall be tried *de novo*, in the Circuit Court, without regard to "any error, defect or imperfection in the original summons or the service thereof." Neither the two cases above referred to nor those therein cited, establish or support the doctrine that, where a defendant is served with a writ of summons at a place beyond the territorial jurisdiction of the court from which it is issued, he waives an objection to the jurisdiction of the court over him, properly made, by going on with his defense to the action, after his objection had been overruled.

But if the State courts have established such a practice, the Federal courts are not bound or controlled by it. Section 914 U. S. R. S., has no application.

In such matters of practice the courts of the United States are left perfectly free to establish and follow a practice of their own.

Ind., etc. R. R. Co. v. Horst, 93 U. S. Sup. Ct. 291;

Matthews v. Densmore, 109 U. S. Sup. Ct. 216;

Erstein v. Rothschild, 22 Fed. Rep. 61.

In the last case Justice Matthews in construing Section 914, and determining how far, under its provisions, the courts of the United States are bound to follow the practice and proceedings adopted by the courts of the State, within which they are respectively held, says: "The act of Congress, at any rate does not require the adoption, with the local statutes, of the local interpretation what may have been put upon them, or which may from time to time be enforced. It must be held that the body of the local law thus adopted in thegeneral must be construed in the courts of the United States in the light of their own system of jurisprudence, as defined by their own constitution as tribunals, and of other acts of Congress on the same subject. It can hardly be supposed that it was the intent of this legislation to place the courts of the United States, in each State, in reference to their own practice and procedure, upon the footing merely of subordinate State courts, required to look from time to time to the Supreme Court of the State for authoritative rules for their guidance in those details."

II.

The trial judge, at the commencement of his charge to the jury, laid down certain principles of law which he informed them must be applied

in the assessment of damages in these cases. The first was that, defendant, having received the cattle for the purposes of transportion, it was bound in law, to deliver them at the terminus of its line in as good condition as it received them.

This rule has no application to the transportation of live stock, and applied to this case was erroneous and prejudicial to defendant.

Hutchinson on Carriers, Secs. 17 to 22;

The second proposition is a modification of the first as it embodies the element of fault on the part of defendant which the first does not. Still it is defective in not limiting the jury to the damages caused by such fault. It does not change the rule of damages. It instructs the jury that if they find there was damage caused by the fault of defendant, then defendant "must pay the difference between the value of the property, in its damaged condition, at the the point of destination, and what the value would have been at the place of delivery in the same condition as when it was received for transportation."

This would include, not only such injuries as resulted from the fault of defendant, but, also the shrinkage, depreciation and other injuries incident to live freight, which the evidence and common knowledge shows are the natural effect of such a journey as these cattle had made, under the most favorable circumstances, and with the greatest care on the part of the carrier.

III.

The third paragraph of the charge excepted to instructed the jury that if they found that seven head of the Leonard Bros.' cattle were left at Nankin, where the collision occurred, either killed or very badly hurt, and were never delivered at the point of destination, or at the end of defend-

ant's line, they should allow their market value at the point of destination in Saline county, Missouri, at the time they should have arrived.

These suits were brought on the common law liability of the defendant as a common carrier. No contracts of shipment were alleged or proved. The petitions allege that defendant was a railroad corporation, operating a line of road in the States of New York and Ohio, and was a common carrier of live stock thereon; that having received the cattle, defendant, "as such common carrier, undertook and became bound to transport said cattle over its said railroad safely, and to *deliver them at the terminus thereof.*" Under these circumstances the destination of these cattle, so far as defendant was concerned, was the western terminus of its line in Ohio, and the market value of these seven head of cattle, at such terminus, was the measure of damages, and not their value at Saline county, Missouri.

2 Sedgewick on Dam. (8th Ed.) Sec. 846;
Marshall v. N. Y. Cent. R. R. Co., 45 Barb. 503;
Louis v. Steamboat Buckeye, 1 Handy (Ohio), 150;
Sangamon & M. R. R. Co. v. Henry, 14 Ill. 156.

This objection applies to the other portions of the charge on the question of damages, as in all of them the market value of the cattle, at their final destination in Missouri, was made the basis on which to estimate the damages, including damages for abortions.

IV.

The court admitted improper evidence, and gave improper instructions on the question of damages as to those cattle which arrived at destination showing signs of physical injury. The cattle were examined by appraisers, selected by plaintiffs, on their arrival at destination: the Estill cattle as they were led out of the cars, and the Leon-

ard cattle the day after they were unloaded. These appraisers testified on the trial as to the condition of the cattle on their arrival. Those who examined the Leonard cattle testified that there were about ninety head in a very bad condition, stiff, sore, lame and bruised, though they could point out no specific injuries to individual cattle, except in a few instances; where they were able to do this they were allowed over the objection of defendant to testify to the market value of such cattle in the condition in which they did arrive, and what the market value of the same cattle would have been if they had arrived in good condition.

The Leonards testified that about thirteen head of their cattle died some time after their arrival, and fixed their value at $450 or $500 a head.

The court instructed the jury in the fourth paragraph of the charge excepted to, that if they found that these cattle died from the effect of injuries sustained in the collision they should allow the Leonards the market value of said cattle in Saline county, and, as to those cattle which arrived in a damaged condition, and were lame, stiff, etc., the jury were instructed to consider to what extent such injuries lessened the market value of such cattle at the time of their arrival in Saline county, and allow the Leonards such sum as would make good such depreciation in value.

It is probable that the eight head of cattle, claimed to have died some time after their arrival at destination, were among those testified to by the appraisers as being in a damaged condition on their arrival. If they were not, then they arrived in apparent good condition.

Plaintiff in error insisted below, and insists here, that the difference in the market value of these cattle as they did arrive, and as they should have arrived, is not the measure of damages to be applied to this class of injuries in this case. But *if it be*, we insist that it must be applied *to all the cattle;* that it is the *final* test of the damages,—and

that plaintiff could not go further, and show that *subsequently* some of the cattle died. The application of these *two* rules enabled plaintiff to recover the difference between the market value of all the cattle, as they arrived, and as they should have arrived, *and in addition* to that, the entire value of those that subsequently died, without showing the result of the injuries to those that arrived in a damaged condition, *but did not die*, but probably recovered with little or no expense to them. This would work manifest injustice to the defendant. If the market value of the injured animals at the time of their arrival at destination was the basis for the measure of damages, there the evidence on the question of damages should have rested, and the court should so have instructed. To illustrate our meaning by a plain case—to which this rule would undoubtedly apply, suppose a shipper sends a car-load of beef cattle to New York, the carrier knowing that they are intended to reach a certain market; that by some fault of the carrier, they are delayed, the market is missed, and the market price is *lower* when they do arrive, than when they should have arrived. In such a case there would be no question but what the rule of damages would be the difference in the market value, and it is equally clear that the shipper could not go on and show that the market *continued to fall*, or the carrier that it afterwards rose.

2. But our claim is that the *difference in the market value of the cattle is not the rule* to be applied to the injured cattle in this case; and that the admission of testimony and the instructions of the court upon that point were erroneous. The petitions allege that these cattle were intended for the Missouri market, and that defendant knew this, but there is no evidence in the record to sustain at least the latter part of this allegation. Plaintiffs were extensively engaged in farming, and in breeding and dealing in cattle in Missouri, and the evidence shows that these cattle were purchased, in part, for the purpose of breeding on

their farms, and in part for sale. It further shows that if these cattle had arrived under the most favorable circumstances, without accident, they would not have been in condition to put upon the market immediately on their arrival at destination; besides, there was no public market at which they could have been sold until the combination sales at Kansas City, about the month of November, to which they took all the cattle the rules of the sale allowed them to take, and those they took were all in first-class order. It does not appear that they *lost any sales* on account of injuries, as least prior to the Kansas City sale. They did not receive the pedigrees of the cattle, without which they could not sell, until two or three weeks before that sale, —between three and four weeks after their arrival.

The universal and cardinal principle governing the question of damages recoverable for an injury done, with no bad motive, is, that the person injured shall receive a compensation *commensurate* with the loss, *and no more*.

1 Sutherland on Dam., p. 17.

The rule of damages applicable to this class of injuries and which should have been applied in this case, is the *real* injury, as shown by the results in the case of each individual animal, if it died, the value of the animal; if it recovered, the expense of cure.

Street v. Laumier, 34 Mo. 469.

From the evidence in the record it is clear that the ordinary effect of the long railroad journey, which these cattle had made, would have rendered them unfit to be put upon the market immediately upon their arrival at destination, and a little time for rest, food and attention would in all probability have put them in good condition, and restored most of those that were sore and stiff from the effects of the collision. In such a case the market value at the time of delivery would not afford the correct rule of damages.

In Winne v. Ill. Cent. R. R. Co., 31 Iowa, 583, where a shipment of flour arrived in such a condition that it had no market value, but a reasonable expense would have put it in such a condition that it could have been sold, the court held that the consignee should have put the flour in a salable condition, and that it would be unjust, in such a case, to apply the rule based on the market value at the time of delivery. The trial in this case took place five years after the collision in which it was claimed the injuries were sustained, and plaintiffs were, or should have been, able to show the result of the injuries *to each animal*, and nobody else could. They should have been compelled to produce *this evidence* and thus show the *actual* injury they had sustained.

Plaintiffs were not entitled in this case to the benefit of a measure of damages based on the market price at the time of delivery without proof that the cattle were intended for sale on the market on their arrival, that defendant knew that fact when it received the cattle, and that there was a market at which they could have been put up and sold at the time of their arrival. There was no such proof offered.

V.

Abortions.

On the question of abortions plaintiff in error insists:

First. That there is no evidence in the record to support a finding that the abortions produced were the result of the collision.

Second. That, assuming that the abortions were caused by the collision, defendant was not liable for consequential results that might affect the aborting cows as future breeders, or their reputation as such among stock men, especially in the absence of notice to defendant of the peculiar character and condition of the cows, and that they were intended for breeding purposes.

Third. That if defendant was liable for consequential injuries to the breeding qualities of the cows, resulting from such abortions, then the measure of damages under the circumstances of this case was the actual injury to the breeding qualities of the cow, as shown by the evidence in each case, and not the difference in the market value of the aborting cows, and the same cows, if they had arrived at destination in good condition.

First. The verdict in these cases are not sustained by the evidence, so far as they are based on abortions. The evidence in the record does not tend to prove that the abortions testified to were caused by the collision. It only proves that most of them occurred after the collision; but there was abortion in the herd before, and while the cattle were in quarantine at Concord.

No witness, expert, or otherwise, testified that the abortions were the result of the wreck, while Caswell and Wilson, experts, gives it as their opinion that they were not.

The evidence shows that one of the cows aborted her calf soon after the cattle were taken to Concord, while she was confined in the stable with the other cattle; that shortly after that the cattle were poisoned by eating Paris Green, and that thirty-six head of the Leonard cows and heifers were taken up and treated by a veterinary. Five of these died, and two aborted from the effects of the poison. When the cattle were shipped about four weeks later, Dr. Rose, the examining physician for the Government, says those cattle that had been poisoned still showed the effects of it. The day after the wreck one of the Estill cows aborted in the car, and from that time until they reached their destination four or five others aborted. None of the Leonard cows aborted until two days after they had reached their destination. From the time the cattle reached home they were fed on corn and other high stimulating feed, with the exception of fifty or fifty-seven

head of cows and heifers, that were taken off, six or seven miles, and put on pasture by themselves, and among which no abortions occurred. Soon after the Leonard cattle arrived at destination, according to plaintiffs' testimony, the cows commenced aborting, and continued at intervals, of a few days up to the latter part of December, a period of about three months, during which time ninety-five head aborted. Of the Estill cows, the evidence tends to prove that in addition to the four or five that aborted on the cars, four or five aborted before the Kansas City sale in November, and two afterwards. So far as it appears from the evidence those cows that aborted showed no signs of physical injury, whilst all those that did sustain physical injuries bore their calves regularly, and did not abort.

One heifer was left at Nankin, so badly injured that she could not be brought on. She had her calf at the regular time, and has been a regular breeder ever since.

Wm. H. Leonard testifies to three heifers in his lot that died about three weeks after they arrived; badly bruised about the ribs and sides, but they had their calves; they did not abort.

Leverett Leonard testifies to fifteen cows on his place in bad condition; badly crippled up—mashed—never offered them for sale. They all bred all right; not a single one aborted (p. 239).

Mr. Elliott says (p. 119), that one of their cows that aborted was lame, but there is no evidence that any of the other twelve or fourteen, which they claim aborted, showed any signs of physical injury, except that they were stiff and sore when they came off the cars. About half of these cows were bred to bulls during the time they were in quarantine (p. 244). The aborted cows were bred regularly as often as they came in heat, and to the same bulls that other cows were bred to indiscriminately, and the aborted cows were not separated from the others (pp. 223, 224).

Dr. Rose, one of plaintiffs' witnesses, testified that Paris Green was an irritant poison, and in proper doses might produce abortion three weeks after taken by a cow, possibly after a longer time than that. That when abortions begin in a herd of pregnant cows there is danger of its spreading, and an aborted cow should be separated from other cows. The testimony of the medical witnesses shows that abortions caused by physical injuries to cows will manifest themselves generally within a few days after the injury.

Mr. Caswell (p. 465), and Mr. Wilson (p. 479), both competent to speak as experts, give it as their opinion that the abortions were not caused by the collision, though that might have hastened those that occurred on the cars. Plaintiffs' evidence shows that there was abortion in this herd before the accident, and the only evidence introduced to show that the abortions, for which they seek to recover, were caused by the collision, is the simple fact that they occurred after it. The facts that there was abortion in the herd before the collision, that none of the cows that showed signs of physical injury after the collision aborted, and that the abortions continued at intervals for three months after the injury, show that few, if any, of the abortions could have been the result of the collision.

Judge Thayer in his opinion overruling the motion for a new trial (Record, p. 515), stated that he entertained doubts, at the conclusion of the trial, whether the evidence as a whole was sufficient to support a finding that the carrier was responsible for all the abortions.

Whilst this court will not weigh the evidence to see whether it sustains the verdict, it will look into the record to see if there is any evidence to support it.

Second. Assuming that the abortions were caused by the collision, defendant was not liable for consequential injuries that might result therefrom to the breeding quali-

ties of the cows or to their reputation as breeders, especially in the absence of notice of the purposes for which they were intended, or allegation of such damage. The petitions allege that the cattle were intended for the Missouri market, and that defendant had full knowledge of the value of said cattle, and the purpose for which they were intended. The only allegation in relation to abortions is that about two hundred and fifty of the Leonard, and about fifty of the Estill & Elliott cattle were cows and heifers in calf, and that about sixty of the former, and twenty of the latter, "*prematurely lost their calves* since and in consequence of the collision. Nothing is said about this premature loss of calves affecting the cows as breeders, or their reputation as such. The allegation that defendant knew the purpose for which the cattle were intended is not sustained by the proof, and there is no evidence to show that defendant knew of the condition of the cattle or that they were intended for breeding purposes. Judge Krekel, who presided at the first trial of the case, instructed that certain facts in evidence amounted in law to notice; he said, "The cattle themselves show that they were imported. The care which was taken in the preparation of the cars, the small number loaded in each, the securing of food and water for their use in the cars, all tend to show and give notice of the more than ordinary value of the cattle. The whole herd being bulls, heifers, and cows, of a certain age, indicated that the cattle were imported for breeding purposes. All this was well calculated to notify the company of the value of the stock they were to carry. Out of this condition grows the liability of which I shall hereafter speak. It may well be doubted whether a railroad company undertaking to carry a promiscuous herd of cattle, would be liable in case of negligence, further than the value of the stock consigned, without reference to the changed value of a cow in consequence of abortion; for, ordinarily, such damages could not be

contemplated in the agreement to carry, but the liability of the railroad company in this case, for reasons indicated, extends further." He then instructed the jury that *under the circumstances* defendant was liable for the effect of the abortion on the breeding quality of the cows. In granting the motion for a new trial, the judge stated as one of the grounds on which it was granted, that instead of charging the jury that certain facts, above stated, amounted, in law, to notice, the question of notice should *have been left to the jury*, still holding that notice must be shown, and we understand that Judge Brewer, then Circuit Judge, concurred in this view. Judge Thayer, who presided at the last trial, held that notice was immaterial, and on the admission of evidence, and in the instructions given and refused, held that defendant was liable for injury to the breeding qualities of the cows, and to their reputation, among cattle men, as future breeders, resulting from abortion, whether it had notice or not, and that the measure of damages was the difference in the market value, at the time of their arrival at destination, between a cow that had aborted and the same cow if she had arrived in good condition.

It is conceded that a common carrier who receives dead freight or live stock, for transportation, without question, in the absence of fraud or misrepresentation on the part of the shipper, is responsible, in case of a loss for which it is liable, for their full value. He has the right to know the *value* of the freight, but this right is limited to *value*. It has no right, and it is not bound to know the contents of a package, or the character and properties of freight delivered to him to transport.

Hutchinson on Carriers, Sec. 439;
Nitro Glycerine Case, 15 Wall. 524.

Plaintiff in error on the receipt of these cattle was bound to know their value, but not their character and con-

dition, or the purposes for which they were intended. If plaintiffs below intended to hold it liable for anything growing out of the peculiar condition of the cows, requiring greater care in their transportation, or which would enlarge or extend the damages beyond what would be likely to result from an injury to cattle in their ordinary and normal condition, or the purposes for which they were intended, then it was their duty to notify it of the existence of such facts and purposes.

It has been held that a suppression or concealment of any fact or circumstance in relation to the nature or character of the goods material to the risk is fatal to the contract of carriage.

Carter v. Boehm, 3 Burr. 1905;
C. & A. R. R. Co. v. Shea, 66 Ill. 471;
Chicago & Aurora R. Co. v. Thompson, 19 Ill. 578;
Cin. & Chicago Air Line R. Co. v. Marcus, 38 Ill. 219;
American Ex. Co. v. Perkins, 42 Ill. 458;
Oppenheimer & Co. v. U. S. Ex. Co., 69 Ill. 62.

In these cases the packages contained articles of greater value or requiring more care in the handling than there appearance would indicate, and the courts held that the carrier had the right to act upon appearances, and assume that the packages contained what they appeared to contain.

There is no evidence of an express notice on these points, and if any notice could be inferred from the facts, the question of their sufficiency should have been submitted to the jury.

2. The damages claimed on account of injury to the breeding quality of the cows, or their reputation as breed-

ers among stock men, resulting from abortion, are too remote and uncertain.

1 Sedgewick on Dam. (8th Ed.) Secs. 142 and 172.

The test, as to the nature of the damages reasonable in this case, is the same as where a party claims compensation for damages which he has not yet experienced; they must be reasonably certain to occur. It is not enough that the damages may occur, there must be such a degree of probability as to amount to a reasonable certainty that they will result from the original injury.

1 Sedgewick on Dam. (8th Ed.) Sec. 172;
Straton v. The N. Y., L. E. & W. R. R. Co., 96 N. Y. 305.

The evidence on the question of the effect of an abortion on the breeding qualities of a cow is, that it may, or may not, affect her in that respect, and that, if the cow is properly taken care of, and is not bred again until the full period of her gestation is passed, the abortion will not affect her injuriously as a breeder.

Abiel Leonard, one of the plaintiffs, speaking of the effect of abortion on the market value of a cow says: "The effect would be to practically reduce the cow to beef, not but what a cow may have a calf after she has aborted. She may or she may not." Mr. McCulloch, p. 421, says in reply to the question, is a cow necessarily injured by abortion: "She may or may not be; I have known them not a bit the worse for it, and again I have known them a good deal worse."

Mr. Caswell, State Veterinary for Illinois, p. 467, says, the effect of an abortion upon a breeding cow will depend altogether upon the treatment of the cow. If she is treated properly after an abortion, that is, kept away from the bull until her proper time comes around, then put to the bull, the chances would be in favor of her getting in calf again.

Mr. Wilson, p. 478, a member of the board of live stock commissioners of the State of Illinois, says that as a result of his observation and experience, if an aborted cow or heifer in the prime of life is allowed her full term (of gestation) and then when she is in condition put to the bull she will most likely prove a regular breeder.

The cases relied on by plaintiffs and by Judge Philips for sustaining the right to recover damages to the breeding qualities of the aborting cows, are

McCune v. The B. C. & N. R. Co., 52 Iowa, 600;
Oliver & Wife v. The Town of La Ville, 36 Wis. 592;
Stewart v. The City of Ripon, 38 Wis. 584.

In the first case the plaintiff sued a railroad company for an injury to a cow seven months in calf which "caused her to lose her calf." There is nothing in the case to show what amount plaintiff recovered, or what was held to be the rule of damages. There is nothing in the case to show that plaintiff claimed or was allowed damages to the breeding qualities of the cow. It is an authority, too, in favor of the right to recover in such a case for the loss of the calf.

The next case is a suit by a husband and wife to recover for injuries alleged to have been caused by a defective bridge. It was alleged that one of defendants was a married woman, four months gone in pregnancy; that the injury produced a miscarriage, and that she suffered, for a long time, great bodily pain, and was unable to attend to her domestic duties. The court instructed the jury that if these damages resulted from the injury plaintiffs were entitled to recover for them. No claim was made for consequential damages to the breeding qualities of the woman as resulting from the miscarriage.

The last case, Stewart v. The City of Ripon, 38 Wis. 584, was a suit by a boy about eleven years of age of a scrofulous tendency for an injury to his arm, caused by

stepping into a hole in the sidewalk on one of the public streets of the defendant city. The Supreme Court held that the city was bound to provide streets that were safe for all classes of people—the infirm, the sick and decrepit, as well as the healthy and robust; that the city was bound to know that people affected with scrofula, of which there are a large class, travelled them, and that such disease might retard, and perhaps prevent a cure in a case of injury from a defect in its streets; and that, under such circumstances, the city might reasonably anticipate that an injury would develop a scrofulous tendency existing in the injured person.

Neither of these cases sustain the claim made here, which is not for the loss of the calf, or for any direct physical injury tothe cow, but for an indirect, consequential injury which may or may not result to the future condition of the cow.

Third. If defendant below was liable at all for consequential injuries to the breeding qualities of cows resulting from abortions, it was only liable for the actual injury, and the market value of the cows in their different conditions was not the proper measure of damages to be applied in this case.

The court allowed witnesses to testify over the objection of defendant, as to the market value of cows that had aborted, at the place of destination in Missouri, and instructed the jury that the measure of damages for abortion was the difference in the market value at the place of destination at the time the cattle arrived, between a cow that had aborted and the same cow had she arrived in good condition.

This we insist was error.

"The fundamental principle governing the question of damages recoverable for an injury done with no bad motive is that the person injured shall receive a compensation

commensurate with his loss, and no more. This is the paramount principle. By it all rules on the subject are tested and corrected. They are but aids and means to carry out this principle, and when, in any instance, they do not contribute to this end, but operate to give less or more than just compensation for actual injury, they are either abandoned as inapplicable, or turned aside as an exception."

1 Sutherland on Dam. p. 17.

Market value is only reliable when it appears that similar articles have been bought and sold, in the way of trade, in sufficient quantities, or often enough to have a market value.

1 Sedgwick on Dam. (8th Ed.) Secs. 243, 246.
Harris v. Panama R. R. Co., 58 N. Y. 660.
Winne v. Ill. Cent, R. R. Co., 31 Iowa, 583.

"If an article of the same quality cannot be procured in the market, its market price cannot be ascertained, and we are without the necessary data for the application of the general rule."

1 Surtherland on Dam. p. 75.

The market value of a thing is the rate at which it is sold; to make a market there must be buying and selling, purchase and sale.

2 Sutherland on Dam. p. 370.

Market value is the price established by public sales in the way of ordinary business.

American & Eng. Encyclopedia of Law. Vol. 4, p. 467.

Carrier liable for loss of a market only when carrier has notice that cattle are being sent to a market.

3 Wood's Railway Law, p. 1608.

There was no market where these cattle could have been put up and sold, either at private or public sale, at the time of their arrival. The first public sale after they arrived was held at Kansas City about the ninth of the following November, nearly seven weeks after their arrival. They spent the intervening time in preparing the cattle for this sale. This was a combination sale, in which only a limited number of cattle were allowed to each person or firm taking part in it. Plaintiffs did not receive the pedigrees of their cattle, without which they could not make a sale, until about three weeks before this sale took place.

It does not appear that they intended to sell, or could have sold any of these cattle before the Kansas City sale. There is no evidence that the railroad company knew that the cattle were to be sold on the market. For these reasons the difference in the market value, at the time and place of delivery, was not the proper measure of damages.

These cattle under the most favorable circumstances would not have been in a condition to put on the market immediately on their arrival.

All the Leonard cows and heifers that are claimed to have aborted arrived at destination in good condition and in calf. There is no evidence that any one of them showed any signs of physical injury. The first abortion in that lot occurred two days after the cattle arrived at destination.

So that, if there had been a market where these cattle could have been put up and sold on their arrival, the ninety-five head of Leonard cows and heifers that are claimed to have aborted, would have sold as well as any cows and heifers in the herd, and would have answered the guarantee which they gave at the Kansas City sale: that they were of a certain pedigree, and had been bred to a certain bull, a certain length of time before the sale. Plaintiffs did not guarantee that the cows were breeders, or even

that they were in calf at the time of sale. If the true rule of damages was the difference in market value at the time of arrival, *that fixed the liability of the carrier*, and it was not liable for what occurred afterwards.

The theory in such cases is that the owner puts the commodity upon the market and sells it. If he wishes to keep it longer he does it at his own risk. The value of these cattle depended on their pedigrees, and the sale of other cattle afforded no basis for the value of these, unless it was shown that the pedigrees were the same. So far as the evidence shows, there never was but one public sale of this peculiar breed of cattle in America prior to that of November, 1883, at Kansas City, and that was held at the same place in the spring of that year. These cattle were then being introduced into this country as an experiment, but the experiment was a failure. They were only suitable for beef, and for this they were too small, ranging from 800 to 1,000 pounds each. At the first sale in the spring of 1883, they went off at fancy prices, and on the strength of that the country was flooded with them, these plaintiffs alone importing in that year between seven and eight hundred head. The consequence was, that the price of the cattle declined and plaintiffs were forced to peddle them out all over the western country.

Whilst the sales of these cattle, *in their normal condition*, were hardly sufficient, or of a character, to establish anything like a market value, there was absolutely nothing on which to base a market value on a *cow that had aborted*. Whilst the witnesses who testify upon this point fix a market value upon an aborting cow, and generally say that it was nothing more than her value as beef, none of them are able to give an instance where a cow was ever sold, either at public or private sale, as a cow that had aborted. They do not base their opinion as to the market value of an aborted cow upon sales, at all, but upon what they understand to be the feeling of stock-men on the question of

purchasing such an animal. This constitutes no evidence of market value. The evidence in this case tends to show that ninety-five head of the Leonard, and about twelve or fifteen of the Estill and Elliott cows aborted. At the time of the trial, all these cows had been sold, with the exception of one of the Estill and Elliott's, and it may be two or three of the Leonards', but none of these were sold as cows that had aborted; they were all sold as breeders. As a general thing they went off with other cattle, when and where, and what price they brought, plaintiffs were unable to state. Every animal in these two herds of cattle had a name which was entered in the herd book, and against this name was a mark or number which corresponded with a mark or number on the hoof or ear of the animal, to what the name belonged, and by this they were enabled to identify and trace the history of each individual, to whom it was sold, and the price it brought. Plaintiffs were able to give the names of but four or five of the aborted cows, and of these they could tell where but one was sold; and the sale of this one Heatherbell of Farmton, appeared in the *Breeders' Gazette* report of the Kansas City sale. She was the first cow that aborted, the day after the collision, and belonged to the Estill and Elliott lot. She was sold as a breeder and brought $805, the highest price paid for any cow at that sale (Rec. p. 494, report of sale).

William Estill says in relation to this cow (Record, p. 144): She was bought by Mr. Kingsbury, my nearest neighbor. He took a fancy to her before we went to Kansas City, and said: If you will guarantee this cow I will buy her. We guaranteed her to be a breeder. He bought her at the Kansas City sale with other cattle. It does not appear whether Mr. Kingsbury knew that this cow had aborted or not, and that the fact was made public at the sale. If it was, and she was sold as a cow that had aborted, it is the only case of the kind which appears in evidence,

and goes to show that the market price of such cows was high. This cow turned out to be a breeder, had a calf and afterwards died. Plaintiffs got their money for her.

W. R. Estill testifies (p. 92 of record), that one of the two cows in their lot that aborted after November 28th, was on his place at the time of the trial, and the other was sold about two years after the collision for $500. She was a breeder. He did not know what became of the other aborted cows, or whether they bred or not; of all the cows, in both herds, that are claimed to have aborted, plaintiffs are only able to trace the history of two individuals, and state when and where they were sold, and what they brought. One of these sold for $805, and the other for $500. None were sold as aborting cows.

The testimony of the Leonards on the subject of the disposition of their aborted cows is substantially as follows:

Abiel Leonard (Record, p. 197) says:

"We did not keep an account of the cows that aborted. Did not examine to see what cows had lost their calves. Could not tell the cows apart without examining the head and ear mark. You could only tell by taking up the cow, seeing the mark on her, and looking at the catalogue for her mark or name. Do not know what became of these cows that dropped their calves. Had a quarter of the cattte on his place. Had sold all of the aborting cows, who they were sold to, he did not know. They went off with other cows. He claims that twenty-five cows aborted on his place."

W. H. Leonard (p. 219) had one-quarter of the Leonard cattle, and claimed that twenty-seven of the cows aborted. Kept these cows eighteen months on his place before selling any of them. Then seven of them got in calf and were sold for $150 each. Five were sold in Denver. The rest were sold at different times with other lots of cattle. Don't know to whom they were sold. Don't know whether they bred again. They were bought [sold] for

breeding purposes. Don't know what they brought. Sold some of the cows that did not abort at Kansas City—the rest along at intervals. Can't tell how long he kept them.

Leveritt Leonard had one-half of the Leonard herd in his charge, though fifty or fifty-seven head of these, being cows and heifers, were kept on a place belonging to Charles five or six miles away. Of the hundred head on Leveritt's farm he claims forty-three cows aborted (p. 238).

Mr. Leonard says (p. 243): "I could not say where a single individual aborted cow went. I know where they altogether went; I know seven of them went to Denver. Don't know which they were. These aborted cows were bred regularly as soon after the abortions as they came round again. Didn't make any distinction between those cows that aborted and those that didn't abort. They were not separated from the other cows. Six of the aborted cows I kept on my farm, that is two or three were returned—sold and returned to my farm—two of them I have there to-day. The six were sold as breeding cows. I knew they had aborted when I sold them, but did not represent that to the purchaser (p. 245). The fact is I didn't know at the beginning of this matter very much about abortions. *I didn't know that they were liable to repeat themselves.* I did not guarantee these to be breeding cows (p. 246). Twenty of the aborted cows went to Montana with other cattle. They didn't bring a red cent. I can't tell what they went for. They were traded for Texas or Oregon ponies. The whole thing brought me in debt (p. 247). There were ten of the aborted cows that became regular breeders (p. 247). Of the forty-three seven went to Denver, six were sold and returned, ten were breeders, twenty went to Montana."

The admission of evidence as to the market value of aborted cows, and the instructions to the jury that the dif-

ference in the market value at the time of delivery at final destination of a cow that had aborted, and the same cow had she arrived in good condition, were erroneous and misleading, and evidently did mislead the jury in arriving at the amounts of their verdicts.

VI.

INTEREST.

The court instructed the jury "when you have assessed the damages in each case, you may compute interest on the damages in each case at six per cent. per annum from the time the suits were brought (that is November 21, 1883, in the Estill case, and November 27, 1883, in the Leonard case) to this day, and I will further instruct you to state in your verdict, separately, the amount of interest which you award, or may award, in each case."

The jury allowed as interest in the Leonard case $11,880, and in the Estill case, $2,362.50.

Interest was not claimed in the petitions.

The question of interest is always one of local law.

Mass. Benefit Ass. v. Mills, 137 U. S. 689.

In Missouri the question of interest, growing out of both contracts and torts has been regulated by statute.

Section 2723, Rev. Stat 1879, provides: "Creditors shall be allowed to receive interest at the rate of six per cent. per annum, when no other rate is agreed upon, for all moneys after they have become due and payable, on written contracts, and on accounts after they have become due and demand of payment is made for money received for the use of another, and retained without the owner's knowledge of the receipt, and for all other monies due or to become due for the forbearance of payment whereof an express promise to pay interest has been made."

Section 2126 of same statute, under the head of damages, provides: "The jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages, in the nature of interest, over and above the value of the goods at the time of the conversion or seizure."

The Supreme Court of the State has repeatedly held that neither of the above sections, or anything in the statute of the State, authorized the giving of interest in a suit for an injury to property caused by negligence.

In Kinney v. Han. & St. J. R. R. Co., 63 Mo. 99, which was a suit for negligently setting a fire, the court says: "We are not apprised of any statutory provision of this State which allows a jury to give interest for such damages as were allowed in this case. There is no such provision in our statute concerning interest, and the seventh section of the act concerning damages (Sec. 2126, R. S.), which allows interest in cases of the unlawful conversion of property by the party sued, would not, in terms, or by analogous reasoning, embrace such a case, when no benefit could possibly have accrued to the defendant by the negligence which occasioned the destruction of the property." The same doctrine has been applied to cases where stock has been negligently killed by railroad companies.

Marshall v. Schricker, 63 Mo. 308;
Atkinson v. A. & P. R. R. Co., 63 Mo. 367;
Meyer v. A. & P. R. R. Co., 64 Mo. 542;
De Steiger v. H. & St. Jo. R. R. Co., 73 Mo. 33.
Keims v. St. L., I. M. & S. R. R. Co., 85 Mo. 611.
State *ex rel.* v. Harrington, 44 Mo. App. 297–301.

There may be some conflict in the Missouri cases on this point, but we think the cases above cited sustain the position that, except in cases of conversion of property,

where the wrong-doer derives a benefit from the use of the property, in which interest is allowed by statute, interest is not allowable for torts.

Interest is not allowable when it is not claimed in the petition.

Shockley v. Fischer, 21 Mo. App. 551.

For the foregoing reasons we ask that the judgments in these cases be reversed, and that if this court finds for plaintiff in error on the question of jurisdiction, that they be sent back to the Circuit Court with instructions to that court to dismiss them at the costs of defendants in error.

All of which is respectfully submitted.

GARLAND POLLARD,
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Att'ys for Plaintiff in Error.

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THE NEW YORK, LAKE ERIE & WESTERN
RAILROAD COMPANY,
Plaintiff in Error,

vs.

WALLACE ESTILL, HUGH W. ELLIOTT,
WILLIAM R. ESTILL,
Defendants in Error,

AND

THE NEW YORK, LAKE ERIE & WESTERN
RAILROAD COMPANY,
Plaintiff in Error,

vs.

LEVERETT LEONARD, CHAS. E. LEONARD, WILLIAM H. LEONARD AND
ABIEL LEONARD,
Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF
MISSOURI.

BRIEF OF DEFENDANTS IN ERROR.

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[illegible]

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

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Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF CASE.

The plaintiffs in the court below, the Leonard Bros., and Estill & Elliott, were the owners, respectively, of 306 and 67 head of fine cattle, imported from Scotland, that were wrecked at Nankin, Ohio, on the sixteenth of September, 1883, by a collision on defendant's railroad, over which they were being transported on their way from the eastern seaboard to Missouri.

Many of the cattle were injured, and Leonard Bros. brought suit against the railroad company, laying their damages at $50,000. Estill & Elliott also sued for the injuries to their cattle, claiming $12,000. The issues and evidence in the cases, except as to the damages, were the same. Upon their removal to the United States Circuit Court, as hereinafter stated, they were consolidated for the purpose of trial, and were heard together before one jury, separate verdicts being returned. There is, therefore, but one record, and one brief will present all the points arising in the cases.

The suits were instituted in the circuit court of Saline county, Missouri, in November, 1883. Writs of attachment, directed to the sheriff of the city of St. Louis, were sued out, which, in addition to a command to the officer to attach the defendant's property, also, in accordance with the state practice, contained a "summons to the defendant, of the nature and effect of an ordinary summons, to appear and answer the action of the plaintiffs," at the next term of the

circuit court of Saline county, Missouri, to be held in the city of Marshall in said county, on the second Monday of February, 1884.

The sheriff of the city of St. Louis made return that he executed the writs in that city, on the seventh of January, 1884, by delivering a copy of the writ and petition to the city passenger agent of the defendant, who was in its business office, and had charge thereof, at the time of said service, and that the president, or other chief officer, could not be found in the city of St. Louis at the time of said service.

At the return term of the writs, the defendant in the court below, appeared and filed in the circuit court of Saline county its petition for the removal of the causes to the Circuit Court of the United States for the Western District of Missouri. The petition stated that the defendant only appeared for the purpose of making the application for removal. It alleged that the plaintiffs in the suits were citizens of Missouri, and that the defendant therein was a corporation organized under the laws of New York, and a citizen of that state, and contained all the allegations necessary to a removal, and was accompanied by a proper bond. The state court thereupon made an order removing the causes to the Circuit Court of the United States for the Western Divison of the Western District of Missouri.

The record was duly entered and filed in the said Circuit Court of the United States, and on the twenty-eighth of May, 1884, the plaintiff in error (defendant in the lower court), filed in said court its motion to quash the writs of summons to the sheriff of the city of St. Louis, and the return of the sheriff thereon, on the ground that the cause of action did not accrue in Saline county, *and defendant's business office was in the city of St. Louis*, and not in said county; and because defendant's railroad did not terminate opposite any point in the state of Missouri — (this evidently referred to a State Statute providing for manner of suing corporations

owning railroad so terminating opposite points in this state)—and that the record failed to show that at the time of the service it was engaged in business in the state of Missouri. The motion conceded that the defendant had an agent and office for the transaction of business in the city of St. Louis and state of Missouri, as stated in the sheriff's return, and the real contention was that, under the Statutes of Missouri, it could only be sued in said city, where its office was located, and that it was not properly notified by the service, in the city of St. Louis, of the summons issued by the circuit court of Saline county. The plaintiffs, however, contended that under the State Statutes, applicable to such corporations as plaintiff in error, it, being a non-resident, was liable in *any* county, and that a summons might be issued to and served by the sheriff of any county or city in the state, where the defendant kept an office for the transaction of its business and had an agent in charge of the same, whether it was in the same county in which the suit was brought or not.

The motion to quash was heard by Mr. Justice Brewer, then Judge of the Eighth circuit, and Judge Krekel, and was denied.

The plaintiff in error thereupon filed its answer to the merits, and the issues raised by the pleadings were tried before Judge Krekel, and a jury, in November, 1885.

The complaints, or petitions as they are called in the state practice, alleged, in substance, that the plaintiffs in the suits were the owners of certain Galloway and Angus or Aberdeen cattle, which they had imported from Scotland, at great expense, and which were very valuable; that they were intended for the Missouri market, and that the defendant had full knowledge of the value of said cattle, and the purposes for which they were intended; that defendant corporation was runuing and operating a railroad through the states of New York and Ohio, and was a common carrier of live stock and other freight over its said railroad; that on or about the

twelfth of September, 1883, plaintiffs delivered their said cattle to defendant, as such common carrier, to be transported over its line of railway, and defendant received said cattle as such common carrier, well knowing the value and character of same, and the importance of transporting them with care and reasonable dispatch. That upon the receipt of said cattle, the defendant, as such common carrier, undertook and became bound to transport them safely over its said railway; that the plaintiffs paid the usual and customary freight for the transportation of said cattle.

That defendant, in disregard of its duty as a common carrier, failed and neglected to transport said cattle in safety over its railroad, but, on the contrary thereof, the defendant's agents, servants and employes negligently and carelessly caused a collision between its trains, and that by reason thereof, a number of the cars in which the cattle were being carried were broken to pieces and the cattle were thrown out of the cars and thrown violently against the cars and each other and were greatly jarred, bruised, maimed and injured, and some killed outright; that a large number of said imported cattle were cows in calf at the time of said accident, and that in consequence of the collision many of them had prematurely cast their calves; that they were detained at the place of the accident thirty-six hours without suitable feed or water, and were thereby greatly injured, and that plaintiffs had sustained damages, &c.

The answer denied all the allegations of the petition.

Upon the trial before Judge Krekel, the jury returned a verdict in each case for the plaintiffs. The defendant filed motion for a new trial, which was sustained because of an error in the charge, and some ruling in reference to the admission of evidence.

For the convenience of parties, and by consent of the court, the cases were by stipulation (p. 21, printed record,) transferred to the Eastern Division of the Western District

of Missouri, and set down for trial at Jefferson City. The cases were again tried in April, 1888. Judge Krekel being sick, Hon. A. M. Thayer presided at this trial.

The evidence showed that the plaintiffs purchased, in Scotland, a large number of high-bred cattle, and imported them to this country for sale for breeding purposes. There were some bulls, but the majority of the cattle were heifers, which had been bred before leaving Scotland, and were in-calf at the time of the railroad collision hereafter referred to. They were shipped from Liverpool to Boston. The ocean trip occupied twelve days. The weather during that time was pleasant, and the cattle reached Boston in good condition and without injury from the trip. They were kept for awhile at Waltham and then removed to Concord. While at Concord some of the Leonard cattle ate some Paris-green and from its effects five died. About thirty others were affected more or less by the poison, and were kept up from Sunday until the following Tuesday, and were then turned out with the other cattle, as fully recovered. The Estill & Elliott cattle did not have access to the Paris-green, and were in a separate lot from the Leonard cattle that did. The cattle remained in Concord two or three weeks after the Paris-green was eaten, and were then shipped to Missouri. At the time of the shipment, they were in good order and condition, and in perfect health. At Kent, Ohio, while they were being transported over the railroad of the plaintiff in error, the train carrying the cattle was divided, and ran in two sections. Upon reaching Nankin, Ohio, the first section pulled in on a switch and stopped, and the second section ran into it. The wreck that resulted was very bad. Several of the cars were almost demolished. Some were thrown from the track, and nine or ten cars so badly damaged that the cattle had to be transferred to other cars. The force of the collision was so great that the cattle were knocked down, the ropes by which they were tied to the cars broken in many instances, and some of

the animals were down with others standing upon them, when found, after the accident. They were knocked against each other and against the cars, and the evidence shows that the shock of the collision was very great.

They were detained about thirty hours without suitable feed or water. The collision occurred Sunday morning, between four and five o'clock, and the train did not start west again until the next day. The cattle were greatly bruised and injured, and the day after the collision the heifers began to abort or prematurely cast their calves. Five of them lost their calves while on the cars in the next two or three days, and from day to day in the next several weeks abortions occurred among the heifers. The number of abortions and the character of other injuries are summarized in the charge, and it is unnecessary to further refer to same here.

The plaintiffs' evidence further showed that an ordinary railroad journey would not have caused the abortions, and that the cattle were fed just as others which did not abort, and introduced some expert testimony to show that the abortions were the result of the collision. The testimony, upon plaintiff's part, further showed that a cow that had once lost her calf, prematurely, was an uncertain breeder, and in the market could not be sold for a breeder, and was only worth what she would bring for beef; that the heifers were worth, in-calf, $400 or $500, in the Missouri market in the fall of 1883, but a heifer that had prematurely lost her calf would not be worth more than beef prices, $25 to $35. The evidence also stated in detail the other animals that were injured, and the nature thereof.

The defendant's evidence was to the effect that where one cow in a herd aborts, others, through sympathy or contagion, will do likewise, although this was controverted by a number of witnesses, and that the aborted cow should be separated from the others. Plaintiffs below showed that the cattle were cared for in the best manner it was possible for

plaintiffs to do. Other testimony was offered as to the cattle that were injured and the extent of the injuries, &c. Also, some experts who stated that the abortions might not have been caused by the wreck.

During the progress of the trial, when the plaintiffs below first offered to make proof as to the abortions, counsel for the railroad company made the following objection (page 52, printed record):

"We object. We claim that, under the circumstances, we are not liable for abortions, nothing except injury to the animals; that damage from abortions is too remote. It is a peculiar condition of things. It is something that we would not anticipate or know anything about. It is not alleged. So far there is no proof that we knew that these cattle were in-calf."

The court said: "My opinion is, that if a railroad company receives a cow, or any other animal, for transportation, that is with calf, and such animal is of greater value at the point of destination, by virtue of her being in such condition, than she would otherwise be, and in the course of the journey, through the fault of the carrier, the animal receives an injury that is the direct and immediate cause of her losing her calf, that is an item of damage that is recoverable from the carrier. It stands upon the same footing as an ordinary physical injury to the animal. Of course, there may be some difficulty on both sides in proving or disproving the fact alleged, that a particular injury sustained led to the loss of calves, but the fact that there is difficulty in making the proof, don't alter the rule of law. The difficulty is one of fact, and not a difficulty in the law. I shall allow you to proceed on both sides, and try that issue of fact."

Counsel for defendant. "Is that, your Honor, without regard to the knowledge of the carrier?"

The Court. "I don't think that has anything to do with it. The carrier had the right to make any inquiry it saw fit,

before it received the property, as to the condition the cows were in, and to make its arrangements accordingly. If no inquiries were made, and the cattle were received, the rule stated, applies."

This ruling was excepted to.

Counsel for the railroad company, upon the question of damages, insisted that the plaintiffs must first show what they realized from each animal, and where sold, if sold at all, and objected to evidence as to the market value of the animals at the time and place of their destination, but the court ruled as follows (page 136, printed record):

The Court—"Suppose they would ask a witness what one of these heifers sold for that had lost a calf; suppose they show in the first place that a heifer with calf is worth $450, and then they should ask what a particular heifer sold for, the witness should answer, that she sold for $10, then, would you not insist that that was not a proper criterion of damage, because, if the animal was sold for less than the market value, it was plaintiff's own fault."

Mr. Werner—"That would be a matter we would have to introduce rebutting testimony about."

The Court said that the rule was the other way, and added (p. 137): "If they were to show that all these cattle that lost their calves were sold for $30, or $50, or $10 each, you might, with reason, insist that that was not the proper criterion of value, because they may have sold them for less than they could have got for them in the open market."

Mr. Pollard—"That is just what they have been doing."

The Court—"That demonstrates that we must adhere to the fixed rules of law. Inasmuch as the damage complained of consisted in part in the fact that certain of these cattle lost their calves, it appears to me to be competent to show what the difference in value was in the fall of 1883, when these cattle arrived in Saline or Howard county, between an animal that was then with calf, and liable to have a

calf within the next two or three months, and one that had aborted its calf."

Mr. Pollard—"I concede that, unless it appears they have not the power to prove its value exactly."

The Court—"When they have shown that fact, and shown that the loss of calves was due to the fault of the defendant, that difference in value *prima facie* is what they are entitled to recover, then the burden shifts upon you to show, if you can, that they really didn't sustain such loss, because they made sales of stock at such figures that the loss did not occur."

This ruling was excepted to by the plaintiff in error.

The court delivered the following charge to the jury:

CHARGE TO THE JURY.

THAYER, *District Judge:*

GENTLEMEN OF THE JURY—In these cases there is no controversy over the fact that the respective plaintiffs delivered to the defendant certain cattle to be by it transported over its railroad, and delivered at the terminus of its line, to plaintiffs or to some connecting carrier.

Estill & Elliott appear to have delivered to the defendant, 67 head of cattle, and Leonard Bros. appear to have delivered about 306 head of cattle. Having received the cattle for the purpose of transportation, the defendant was bound to deliver the respective herds of cattle at the terminus of its line, in as good condition as it received the same.

The complaint made is, that defendant did not deliver the property in question at the terminus of its line, in the condition that it received the same, and damages are claimed by the respective plaintiffs on that account.

It is practically admitted (and you may take it as a conceded fact), that while these two herds of cattle were in defendant's custody and in transit to their destination, a colli-

sion occurred at Nankin, Ohio, between two freight trains of the defendant, in which the cattle were being transported.

Now, the main and about the only question you will have to consider is the nature and extent of the injuries (if any) that were sustained by the cattle immediately in consequence of the collision.

When you have settled those questions, you will have practically decided the case, and it is to be hoped that you will give these questions a careful and fair consideration and decide the same according to the evidence and rules of law, which I will now state for your guidance.

The law is, that a common carrier like the defendant, must pay the market value at the point of destination, of all property entrusted to it for transportation, which through its fault, is lost or destroyed and is not delivered.

The law also, is that if a carrier receives property for transportation, and delivers it at the end of its route, but, through its fault, it is damaged, and it fails to deliver it in the same condition as when received, it must pay the difference between the value of the property in its damaged condition at the point of destination and what the value of the property would have been at that place if delivered in the same condition as when it was received for transportation.

These are the general rules of law which must be applied in the assessment of the damages in the two cases now on trial.

The testimony tends to show that seven (7) head of Leonard Bros.' cattle (5 heifers and 2 bulls) were left at Nankin, Ohio, where the collision occurred (either killed or very badly hurt), and were never delivered at the point of destination or at the end of defendant's line.

If you find such to be the fact, you will allow Leonard Bros. for those seven (7) head their market value, as shown by the evidence, at the point of destination in Saline county at the time they should have arrived.

injuries, and evidence that will enable you to assess the damages with reasonable accuracy.

Inasmuch as the cattle came into their possession shortly after the collision, and they thereafter had the custody of the cattle, the rule should be strictly enforced, requiring them to show by satisfactory evidence the nature of the injuries received, the result of the injuries, and to what extent the market value was thereby impaired.

What I have said about the assessment of damages in the case of Leonard Bros. applies equally well in the case of Estill & Elliott.

This difference is to be noted in the two cases, however.

None of the Estill & Elliott cattle appear to have been killed in the collision, or to have subsequently died from injuries claimed to have been received in the collision.

You will have no claim of that kind to consider in the Estill & Elliott case.

In this case there is evidence tending to show specific injuries sustained by three bulls, one of which was injured in the testicles, and two in the back or loins. W. N. Marshall and Benjamin E. Nance, who claim to have examined the Estill & Elliott cattle on their arrival, describe injuries to three bulls said to have been hurt in the back, loins, or testicles. They also say generally that from 10 to 15 cows and heifers were in very bad condition, and that one cow had lost an eye.

The plaintiffs themselves have given some testimony as to the condition of their herd on arrival at Estill. I call your attention to their testimony, and ask you to consider it carefully.

In the Estill & Elliott case, there is also evidence tending to show that 5 of Estill & Elliott's cows aborted their calves before they reached Estill; that 4 or 5 aborted their calves prior to October 26, 1883, when a portion of the herd was taken to Kansas City, and 2 afterwards, making 11 or 12 in all.

With reference to these two kinds or species of injuries claimed to have been sustained by the Estill & Elliott cattle, I instruct you, as before, that if the evidence shows to your satisfaction that any of the animals sustained such injuries as the immediate result of the collision, and that the injuries so sustained lessened the market value of the stock so injured at the point of destination, then you will be authorized to allow Estill & Elliott such reasonable sum as in your opinion, under the evidence, will make good the depreciation in the value of any of the animals that you find to have been injured either by strains, bruises, &c., or by losing their calves.

Now, gentlemen, on the other side of this case, you have the testimony of Mr. Baldwin, Mr. McCullogh, and Mr. Geagan, who claim to have examined the stock of Estill & Elliott and Leonard Bros., on the 27th and 28th days of September, 1883, (eleven or twelve days after the collision), with a view of ascertaining the injuries the stock had received.

I will direct your attention to the salient points of their testimony:

Mr. Baldwin says that among the Estill & Elliott cattle he found in a lot of 49 cows and calves one or two a little lame. In another lot, consisting of two bulls and one heifer, he found the heifer had a sore foot and the bulls were a little stiff, and that one other heifer was pointed out as having lost her calf.

McCullough's testimony, with reference to the same herd, is to the effect that he found one bull a little stiff, one (1) cow very stiff, two other bulls (one in a stable and one in a pasture) both a little stiff, and one heifer with a sore foot.

In relation to the Leonard cattle, Mr. Baldwin says he found 3 stiff or lame heifers in a herd of 35 animals; one cow a little stiff in a herd of 29 cows, and three that were said to have lost their calves; one heifer also that was said to have lost her calf; one lame cow in a herd of 30 animals; one other cow in a herd of 32 animals that was said to have lost

her calf; one bull in a herd of 17, lame in the fore leg; two other bulls in a herd of (9) animals, slightly injured, one lame or stiff and one with slight flesh-wound; one other bull with hoofs swollen and wound in left hind leg.

Mr. McCullough's testimony as to the same herd (that is, with reference to the Leonard cattle) is to the following effect, namely, that he found 3 footsore heifers (one very sore) in a herd of 35 animals; 3 heifers said to have lost their calves, in a herd of 29 head; 2 lame bulls in a herd of 5 animals, one footsore and one said to be not fit to serve cows; 2 lame cows in a herd of 26 cows and calves; 1 bull noticeably lame in a herd of 17 bulls; 1 bull with a slight wound in his thigh, and one other with a slight flesh-wound.

All three of these witnesses say that the injuries to the two herds were not greater or different than might be expected to result from an ordinary long railroad journey, and that none of the injuries, in their judgment, were serious or liable to produce permanent disability.

From a summary of the evidence, as I have noted it, gentlemen, the testimony for the plaintiffs tends to show that about 48 animals in Leonard Bros.' herd (18 bulls and about 30 cows), after their arrival in Saline county, showed visible evidence of having been injured in the collision, whilst, according to the evidence for defendant, there were only 10 animals (5 bulls and 5 cows and heifers) which bore any visible marks of having been hurt.

In the Estill & Elliott case, it appears from the plaintiffs' testimony, that 3 bulls and from 10 to 15 cows sustained injuries, the injuries to the bulls being of a serious character, whilst, according to the testimony of defendant's witnesses, only 4 animals (3 bulls and one cow) bore any evidence of injuries.

In the foregoing summary, you will understand that I do not include cows or heifers that are said to have lost their

calves. I refer only to animals that are said to have shown outward signs of injury.

In the light of the testimony, both for the plaintiffs and defendant, to which I have alluded, and in the light of any other testimony in the case which you may recall, and bearing in mind that the burden of proof is on the plaintiffs to show that the cattle in question received injuries and the extent and result of such injuries, you will have to determine the following important questions of fact, namely:

1st. How many cattle in each herd were injured in any manner, in consequence of the collision, to such extent as to lessen their market value at the point of destination?

2d. How many of Leonard Bros. cattle were killed or badly injured and left at Nankin, Ohio, in consequence of the collision, and what would have been the value of such cattle in Saline county, at the time they should have arrived, if they had been delivered in the condition in which the defendant received them?

3d. How many of Leonard Bros.' cattle (if any) died of injuries received by the collision after they had been delivered to Leonard Bros., and what was the reasonable market value in Saline county of those cattle if they had arrived uninjured?

4th. How many animals in each herd lost their calves as the direct result of the collision, and to what extent did such loss of their calves lessen their market value at the point of destination?

5th. What number of cattle in each herd, besides those that are said to have died or lost calves, were otherwise injured by the collision, by strains, bruises, &c., so as to materially lessen their market value, and what was the amount of such depreciation in value?

To arrive at a just and intelligent verdict in these cases you will have to determine from the testimony each of the foregoing questions.

There are one or two other matters to which I will refer briefly. There is testimony in the case tending to show that in the last days of August, 1883, some of Leonard Bros.' cattle (and possibly some few of Estill & Elliott's cattle) found some Paris-green, and ate it at Concord, Mass.

The proof tends to show that 5 head of Leonard Bros.' cattle died of poison at Concord, and that about 30 other animals were made sick by it and were treated.

You will understand, of course, that if any of Leonard Bros.' cattle that are said to have died after they reached Saline county, or if any of the cows in either herd that are said to have lost their calves, died or lost calves in consequence of eating Paris-green, then the railroad company is not responsible for the loss so occasioned.

There is also some testimony tending to show that when one or more cows in a herd give birth to calves prematurely, or abort, as the saying is, other cows in the same herd, unless separated from the cows that have aborted, are liable to cast their calves through sympathy or contagion, although they have themselves received no physical injury. This is a matter that requires your attention.

If it be true, and you find that cows will abort through sympathy or by contagion, then it was the plaintiffs' duty, if they could have done so, to have separated cows that had aborted from other pregnant cows, and to have done so with reasonable and ordinary diligence; and if plaintiffs failed to exercise reasonable and ordinary diligence and caution in that regard, and any cows lost their calves in consequence of such negligence, then defendant is not liable for such losses, as they were not the immediate and direct result of the collision, but the result of plaintiffs' neglect.

I will also say that defendant can not be held liable for losses occasioned by premature birth of calves, or by the death of stock, if such births or deaths were the result of overfeeding or the result of change of climate or fatigue or

heat, or of a long voyage on the ocean or by rail, or of all such causes combined.

In other words, gentlemen, the defendant is only liable for such premature births and deaths as are shown, by the testimony, to have been directly occasioned by injuries sustained in the collision.

The question as to what causes led some of the animals in the two herds to lose their calves, or to die, after arrival, is a question which you may find some difficulty in solving, as in the nature of things these are questions that do not admit of solution by positive or direct proof.

I will only say that you must apply your best judgment and your experience to the solution of these questions, giving to all the testimony, including that of the experts, such weight as you think it fairly deserves.

If, upon a fair consideration of the subject, you deem the evidence insufficient to establish what was the cause of the abortions, then it will be your duty to disallow the plaintiffs' claims for damages on that account.

If the evidence establishes, to your satisfaction, that some of the abortions were the direct result of the collision, but leaves you undecided as to the cause of other abortions, then you should allow damages for such as you are satisfied were the result of the collision, and disallow the plaintiffs' claims as to the residue.

When you have assessed the damages in each case you may compute interest on the damages in each case at—(6) per cent per annum, from the time suit was brought—on November 21, 1883, in the Estill case, and November 27, 1883, in the Leonard case—to this date. I will further direct you to state in your verdict the amount of interest which you will award in each case.

In conclusion, I ask you to give the cases a careful and unbiased consideration. Consider the evidence in behalf of both parties in the same spirit of fairness that you would

have it considered if you were yourselves personally interested as plaintiffs or defendants in the result of the suit.

The jury returned a verdict, in the Leonard case, for $44,000 damages, and $11,800 interest on same, making $55,880; and in the Estill & Elliott case for $8,750 damages, and interest $2,362.50, making $11,112.50.

The Railroad Company filed motions for new trial, which were overruled, the Leonard Bros. being required to remit, however, all in excess of $50,000, that being the amount of damages laid in the petition.

Judge Krekel having died, and Hon. John F. Philips having succeeded him as District Judge, the motions for new trial were heard by Judges Thayer and Philips, and in disposing of the motions, they delivered the following opinions:

OPINION OF JUDGE PHILIPS ON MOTION FOR NEW TRIAL.

Jurisdiction.

My conclusion is, that a foreign corporation having an office in this state is, under the present statute, to be treated as a non-resident defendant, and the provision of subdivision four, Sec. 3481, R. S. Mo., applies, and therefore the suit could "be brought in any county." It seems to me that the provision of statute invoked by defendant must necessarily refer and be limited to domestic corporations.

Judge Hough, in *Stone vs. The Travelers' Insurance Co.*, 78 Mo., 658, said: "The defendant, being a non-resident of the state, was subject to suit in any county in this state (R. S., Sec. 3481), and could be personally served in the manner pointed out in the section under consideration. It may be conceded to defendant's counsel that this enunciation was not essential to the determination of that case; but it does not necessarily follow that the authority of this declaration can be waived by calling it a mere *obiter dictum*. It, in no unmistakable language, indicated the view of the state Supreme

Court, and I am the more inclined to attach importance to it from the known fact that Judge Hough was a careful writer, and was not given to inconsiderate expressions in matters of statutory construction.

There can be no question but that if this cause had remained in the state court, and the defendant, after moving to suppress the sheriff's return, had pleaded and gone to trial on the merits, the defective service would have been waived (*Kronski vs. R. R. Co.*, 77 Mo., 362; *Scoville vs. Glasner*, 79 Mo., 454–5), and it does seem to me that where a party has thus removed the cause into the Federal court and tried it on its merits, had one new trial, and has again retried it on the merits in its own approved jurisdiction, it would be trifling with the administration of justice to allow it to escape judgment on the ground that it had never been in court. As said in *Scoville vs. Glasner*, *supra*, "He ought not to make the court a place of chance, and appeal only when he has failed on another accepted issue."

Abortions.

An examination of the evidence on this issue shows that it presented conflicting views and facts, bringing it especially within the province of a jury to try and draw such inferences and conclusions as to them might seem reasonable. In several instances, the abortions followed so early after the collision, while en route and immediately after reaching the destination, as to make it quite probable that they were the direct result of the injury. In other instances, the evidence was such as might well have justified the jury in concluding that other causes independent of the collision may have occasioned the injury. But whether or not such independent causes, or all combined, constituted the *causa causans*, is not so apparent to my mind, as to authorize the trial court to take the case, as to the whole or any part, from the jury. The proximate relation between the time of the injury and the time of

abortion can have no defined limit as a matter of law. So much depends upon the constitution, temperament, and physical condition of the animal at the time, that it must remain largely a question of fact and legitimate speculation, whether or not the loss resulted from the injury. In this view, I attach no great importance to the fact suggested by counsel, that some of the cows, apparently more seriously injured in the collision, did not abort until some time after others seemingly less injured. Much would depend upon the peculiar nature of the injury, the state of pregnancy, the concussion in the region of the womb, and the constitutional temperament and health of the animal. The difficulty a jury may encounter in the analysis of testimony, the separation of substance from speculation and fact from mere conjecture, is no reason why the case should be withdrawn from their consideration. (*Holcomb vs. People's Savings Bank*, 92 Pa. Stat., 338; *McCoy vs. Hyatt*, 78 Mo., 139.)

It is only where the plaintiffs' evidence is such as to leave the jury to grope in darkness, with no substantial, tangible facts to guide them, that the court should interfere. The moment the judge begins to adjust his judgment on considerations of the reasonableness of the jury's conclusion, drawn from disputable facts, there is danger of substituting his mind, his analysis and discrimination, for that of the jury, and thus indirectly deny to the litigant his constitutional right of trial by jury.

The charge given to the jury pointed out to them very clearly the different facts bearing on this issue, and, as they are supposed to have heeded the charge, the presumption is they were satisfied from the evidence that the abortions were traceable to the collision rather than to any other reasonable source.

Measure of Damages.

Criticism is made on this phraseology of the court's charge to the jury: "Having received the cattle for the pur-

pose of transportation, the defendant was bound in law to deliver the respective herds of cattle at the terminus of its line in as good condition as it received the same."

It is suggested that this language was too comprehensive and was calculated to mislead, as it would include in the damages those incidents inseparable in the exercise of reasonable precaution from the transportation of live stock, such as stiffness or soreness, or injuries done by one to the other, and the like. This language must be considered in connection with the whole charge and construed with reference to the subject-matter and the sense in which the jury of ordinary intelligence are to be presumed to have understood it. The subsequent part of the charge very clearly shows that the changed "condition" alluded to was such as resulted from defendant's culpable negligence as a carrier—in other words, from the collision — as that was the gravamen of the complaint and the matter over which the contention was had.

Nor do I think there was any hurtful error in this respect as applied to the special instance of the bull "Lord William;" for, while the plaintiffs' evidence tended to show that in his apparent condition, when landed in Saline county, he was seriously injured or worthless, it must be presumed the jury heeded the subsequent facts developed that plaintiff realized $715 in his sale.

Under this head, counsel make two other objections to the ruling of the court. One is the plaintiff should not have the benefit of the damages apparent at the time of the completion of the carriage; and the other, that they been required by their evidence to trace out the each animal sued for and show the result of the consequent damage at a period beyond the time at the end of the journey. The argument is th parent condition of the animal may have been mere travel, and without further proof the presump be that the animal soon recovered, and for such

not liable as a common carrier. This proposition inevitably leads to the second contention, that the plaintiff should, in developing his case, go beyond the date of arrival in Saline county, and trace out the history of each animal up to the date of trial. It is contended that the general rule of damages laid down by the court is applicable only to the carriage of inanimate substances, such as merchandise, and possibly to beef cattle destined to a known particular market, but not to cattle designed for ordinary use. The only authorities cited in support of this proposition are *Street vs. Lanmier*, 34 Mo., 469, and *Gettell vs. West*, &c., *R. R. Co.*, 8 Allen, 560.

These cases but establish the rule, that in the action of damages for an injury to a horse, where the animal recovers, the plaintiff may, under proper averments, recover for medicines and services in curing the animal, and his depreciated value, up to the time of trial. But this in nowise trenches upon the general rule, that in the action of damages for breach of contract by a common carrier, for the transportation of property injured *in transitu* the measure of damages "is the difference between the value of the goods as or in the condition delivered, and what their value would have been if they had not been damaged in the course of transportation." (3d Suth. Dam., 237; *Gray vs. Mo. R. R. Co.*, 64 Mo., 50.)

I know of no distinction made in favor of live stock. The instance put by counsel, as to shipment of beef cattle destined for a particular market, does not help his argument. In that case the law will compel the shipper, if he had notice when he received the cattle that they are designed for a particular market, on the date they should have been delivered, without regard to the market value at the termination of the route when delivered. This is the exception to the general rule. So Sutherland, vol. 3, p. 243, says: "The carrier can be charged with no more than the market value, there, unless

he has contracted to carry it there to fulfill a contract of sale at a greater price." And this author, both on reason and authority, in the same connection, proceeds to combat the proposition that the carrier should have the benefit of a contract by which the consignor was really to have less than the market value at the point of delivery, when the carrier had no notice of such sub-contract. The rule in question is one of protection to the carrier, and he ought not to be heard to complain of it.

Nothing is better established than that the plaintiffs, for the purpose of augmenting their damages, would not be permitted to show what they in fact did sell certain cows for. Although defendant might be permitted to do so (as was accorded to it in this case), for the purpose of showing that plaintiffs in fact were not damaged or to the extent claimed, why, then, require plaintiffs, in the first instance, to procced affirmatively to trace out the subsequent history of each cow when they could not enhance the measure of damages by showing that in the final disposition they received only so much for her?

Again, such a rule would in practice lead to confusion and involve the jury in the inextricable mesh-work of collateral issues and enquiries after facts absolutely unascertainable with any proximate certainty. Rules of law for the attainment of justice must be uniform and certain. The rule as to the measure of damages permits the plaintiffs, up to the time of trial, to show the condition of the injured animals, merely as a means of ascertaining the result of the injury inflicted so as to better enable the jury to fix the damages at the time and place of delivery. If the cows did subsequently abort, this is proof only of the extent of the injury inflicted, as much so as if they had subsequently died from the effect of the collision. The only known limit to the inquiry up to the trial is, whether or not, the subsequent development in the condition of the animal is traceable directly to the in-

jury inflicted by the carrier. (*Kain vs. R. R. Co.*, 29 Mo. App., 61–62; *Sorenson vs. N. P. R. Co.*, 36 Fed. Rep., 166, 167.) The direct proximate consequences of a wrongful act are those which occur without any intervening independent cause, and the extent of time between the injury and the consequence does not affect the rule. (*Brown vs. R. R. Co.*, 54 Wis., 342.)

II. It is further insisted, in this connection, that the evidence on the part of the defendant especially tended to show that the effect of an abortion on a cow, is too conjectural and uncertain to make it the basis of damages. To support this assumption it is cited that a cow having once aborted may, under certain conditions of treatment and reletting to the bull, breed again, and that abortions may measurably be prevented by the isolation of the pregnant cow. But how do such facts affect the question of such injury and abortion depreciating the market value of the cow? As well say that the market value of a stallion is not affected by the fact that he is an uncertain foal-getter, or is certain only under favoring conditions of treatment and delays not common to other breeders. This very fact depreciates his market value, and proof of it should go to the jury for them to say to what extent it impairs his value.

It is further urged that such damages are special and not the natural and ordinary result of the injury. As well might it be said that in the case of a female passenger in a state of pregnancy receiving an injury in a collision, she might have recovered, without difficulty or serious consequence but for the fact that she happened to be enciente, and the injury brought on premature delivery, resulting in death. The railroad company could not attribute the death to the abortion, and escape damages consequent thereupon, for he whose negligent act puts in motion an instrument of mischief, is answerable for the consequences directly flowing from the wrongful act.

Defendant seems to complain that plaintiffs were permitted to show that the cows were designed for breeders, and that it should not be held to the measure of damages without having notice of such fact when it made the contract of shipment; the result of which would be, that in estimating the market value of the cows, the standard would be their value for beef. If this were admissible, the facts and circumstances are such as to affect the defendant with notice. It knew these cows and bulls were imported from Europe; they were not going east in the direction of the beef market. Why were they being brought from abroad and carried across the continent, to the interior of Missouri? No jury, on such evidence, would be permitted by the court to find that defendant had a right to suppose that such cattle, consisting of bulls, cows and heifers, were designed merely for beeves. No jury could hesitate to find, from facts so obvious to the common sense of mankind, that defendant had notice of the fact that such cattle were designed for breeding purposes. The learned counsel for defendant recognizes this obvious fact in his argument in this cause, where, on page 26, he says, "Seven head were sold in Denver in 1885. They were evidently sold as breeders, as cattle are not shipped there for beef." The fact that such cattle would likely breed or not would, in the ordinary course of things, affect their market value in Saline county, as the evidence abundantly shows; and if, by reason of the injury, that market value was depreciated it is a consequential damage directly ensuing from the injury. The charge to the jury, in its separation and classification of the facts, clearly put the burden of proof on plaintiffs to show what damages were sustained through injuries and abortions. After plaintiffs made proof of the number of abortions, and the effect thereof on the market value of the cows, they had made out a *prima facie* case. The defendant was then accorded the right to follow up, in detail, the subsequent history of each injured animal, and show, if

the fact existed, that the real damage was less than that claimed by plaintiffs. The fact, that it may have been difficult or inconvenient for defendant to do this, can not alter the rules of law or evidence. The argument "*ab inconvenienti*" would often overturn most valued and deep-rooted rules. This is an entire misapplication of the rule of evidence invoked by counsel that the party in whose exclusive possession certain evidence is should produce it.

Notice.

It is insisted with great zeal and ability by defendant that it should not be held to accountability for the result of the miscarriages of the cows, without proof of notice to it at the time of their acceptance for transportation, that the cows were pregnant. The general rule on this subject is well stated in *Hart vs. Penn. R. R. Co.*, 112 U. S., 340: "As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods, though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity." So Sutherland on Damages, vol. 3, 343–344, clearly recognizes the liability of a carrier where he has failed to qualify his liability by a notice to the shipper, or qualification of the contract.

Counsel for defendant, having to concede this general rule, contend that it is limited to the mere value of the property taken for transportation, but does not apply to the condition of the property. In support we are cited to the nitroglycerine case, 15 Wall., 524. This case is not pertinent. It presented the question as to defendant's liability for injury

to adjacent property, occasioned by the explosion of a package of glycerine opened by him, without carelessness, in ignorance of its contents, which package was taken for transportation.

It did not involve the question as to whether or not the carrier would have been liable for the loss or injury to the package taken by him in ignorance of its contents when received.

In *Hart vs. R. R. Co.*, *supra*, the shipper was not permitted to recover the actual value of his race-horses injured in transportation, for the sole reason that he had by special contract limited the carrier's liability to a less valuation. The reading of this case, however, and the authorities therein cited can leave no doubt, that but for the special contract the carrier would have been liable for the inherent value of the racers, although unknown to it at the time of acceptance for transportation.

The case of *McCune vs. R. R. Co.*, 52 Ia., 600, presents a case more in point. That was an injury in transportation to a cow with calf.

While it is true, the cow was so far advanced in pregnancy as possible to have warranted the inference of notice of the fact, yet the opinion of the court is not so confined, but in unmistakable terms the court lays down the law to be, that shippers of live stock are not required "to seek the agent of a carrier and make known the physical condition of his stock." The opinion further says: "As well require each passenger, upon purchasing his ticket or upon boarding the train, to make known his physical condition, so that the carrier might exercise more care in running the train to avoid collision or accidents from other causes."

Suppose a woman, in a state of pregnancy not obvious to the casual observer, should take passage on a railroad car, and through the negligence of the carrier, receive an injury resulting in abortion, greatly impairing her general health and

usefulness. In an action for damages, would not proof of this fact be competent in aggravation of damages, as the direct result of the injury? and would it be any defense, that on taking passage she did not notify the ticket agent and conductor that she was enciente? I think these questions are answered adversely to defendant's contention in the cases of *Oliver vs. Town of La Valle*, 36 Wis., 592; *Stewart vs. City of Ripon*, 38 Wis., 591.

The Verdict.

Time will not permit me to enter upon an analysis of the evidence to show whether or not there was evidence to reasonably justify the amount of the jury's award. The attention of the jury was clearly enough directed to the evidence touching the result of the injuries, and as to what number, and the character of cattle were affected. As a matter of course, what the plaintiffs paid for the cattle in Scotland, and what they cost them landed in Saline county, could not be considered by the jury. There was evidence in the case to warrant the amount of the verdict. It is true that the conclusions of the jury must in part have been predicated upon expert testimony. But if that testimony was competent, its probative force was for the jury. It would involve a contradiction in practice for the court to hold that certain evidence was admissible for the establishment of a given fact, and then say that, although it carried satisfaction to the minds of the jury, the court would not abide the finding, as it may have been rather problematical than founded on known facts.

OPINION OF JUDGE THAYER ON MOTION FOR NEW TRIAL.

These cases were tried together before me whilst holding the Circuit Court in the Central Division of the Western District of Missouri, during the illness of the late Judge Krekel.

At my request, Judge Philips sat with me on the hearing of the motion for a new trial, and subsequently examined the

stenographer's report of the testimony. At my solicitation, he has prepared and forwarded to me, a written statement of his views touching the merits of the motion.

The views expressed by Judge Philips (which are herewith submitted), are so comprehensive of the questions raised by the motion for a new trial, and are so fully in accord with my own, that I shall only supplement what he has said by a few additional observations, chiefly concerning the contention that the damages are excessive.

In the Estill & Elliott case the evidence tended to show that three bulls, valued at from $500 to $600 each, were so badly injured that the three were eventually sold for about $200; that from ten to fifteen cows were bruised or maimed in various ways, so as to affect their market value, and that at least thirteen cows dropped their calves prematurely.

In the case of Leonard Bros. the evidence tended to show that seven head of cattle, valued at from $3,500 to $4,000, were either killed outright by the collision or were so badly hurt that they were abandoned at Nankin, Ohio, where the collision occurred; that thirteen head of cattle, worth on an average $500 each, or $6,500 in the aggregate, died of injuries received after their arrival in Missouri; that from 30 to 40 other animals (bulls and cows) sustained injuries of a character that materially depreciated their market value, and that ninety-five cows dropped their calves prematurely.

In both cases the evidence tended to show that the injured animals were worth, on the average, if unhurt, from $400 to $500 per head. The evidence further tended to show that if a cow from any cause drops her calf prematurely it permanently lessens her market value as a breeder; that, as a general rule, an accident of that kind, if it becomes known, reduces the value of the animal to what she will sell for as beef; that a miscarriage destroys, in a great measure, the value of an animal as a breeder—at least, in the estimation of

stock-raisers. It was further shown, that as beef cattle, the cows were not worth to exceed $30 or $40 per head.

The jury may have found, and no doubt did find, that all of the foregoing facts (which the evidence conduced to show) were established by the testimony, and the damages may have been, and probably were, assessed according to that view of the case.

If the jury, furthermore, found that the numerous abortions were the direct result of the collision, and allowed damages on that account, as well as for the other losses and injuries above described, the amount of the verdict in each case is readily explained in a manner consistent with the facts as found by the jury.

In my judgment, therefore, the court can not say that the verdicts are excessive, and disturb them on that ground, unless it be true that the rule adopted by the court, to estimate the damages, was erroneous; or unless it be true that the evidence was insufficient to warrant the jury in holding the carrier liable for the abortions that occurred.

Both of these questions have been considered by Judge Philips, in the main decision, with his usual care and ability. I shall only add a few additional suggestions.

Defendant's counsel apparently assumes that the fact that a cow lost its calf prematurely, did not permanently lessen her market value; that such animals, or a large portion of them at least, by careful treatment would regain their capacity to breed regularly, as well as their original or normal value as breeders.

On this hypothesis defendant's counsel contend that plaintiffs should have been compelled to trace the subsequent history of each aborted cow, and that the measure of damages is what it may have cost to support and treat the animals during the period of disability, plus the depreciation in value shown to exist at the date of the trial.

Whether any allowance ought to be made for the loss of

calves during the period of disability is not stated and apparently is not considered.

I apprehend, however, that that is an element of damage, and a very important one, that ought to be considered if defendant's theory of the measure of damages is adopted, inasmuch as the cattle were very valuable, and the period of disability might extend over eighteen months or two years, even if the animals eventually became regular breeders.

Now, in addition to the criticism made by Judge Philips, that defendant's method of estimating the damage is not in harmony with a well-established rule on the subject, and if adopted, would necessarily embarrass the trial of the cases with a multitude of collateral issues, I shall venture the criticism that the argument advanced in behalf of that method of computing the damages also overlooks or misconceives some important testimony produced at the trial, which, in my judgment, has an important bearing on the question of the measure of damage that ought to have been applied.

While it is true that there was some evidence that the market value of a cow, intended to be used as a breeder, is only temporarily affected by a miscarriage, and that her capacity to breed regularly may be restored by proper treatment, yet there was also very much testimony, and I may say that the weight of testimony was, that the value of a cow is permanently depreciated by losing her calf prematurely; that men engaged in stock-raising will not usually buy such animals for breeding purposes, because they are generally regarded as uncertain breeders at best.

If it be a fact that they are regarded by stock-raisers as uncertain breeders, and if it be true that the market value of an animal is permanently depreciated by suffering a miscarriage, no substantial reason can be given why the damages allowed for the abortions said to have been occasioned by defendant's negligence, should not be the amount of the depreciation in value estimated as of the date of the injury.

An injury of that sort which permanently depreciates the value of an animal is essentially like a physical injury, such as the loss of a limb or an eye, and I can conceive of no reason why there should be any difference in the method of assessing the damages.

I shall only add that defendant's counsel have cited no authority which, on careful consideration, appears to me to sustain the position which they have assumed touching the measure of damage.

If it had been shown to the satisfaction of the court that the kind of injuries now under consideration, did not permanently affect the value of the animals as breeders, there would have been more apparent reason for applying the rule which defendant's counsel invokes; but even if the rule invoked had been applied, and due allowance had been made for the cost of supporting the animals during the period of disability, as well as for calves lost in the meantime, it may well be doubted whether the rule would have operated to the advantage of the defendant.

But, be this as it may, the testimony produced at the trial did not, in my opinion, warrant a departure from the ordinary rule.

I confess that I entertained some doubt when the trial of these cases was concluded, whether the evidence as a whole was sufficient to support a finding that the carrier was responsible for all of the abortions. The question as to what caused such accidents in large numbers, was one of more than ordinary difficulty, inasmuch as it was not susceptible of accurate solution, but depended largely on inferences to be drawn from established facts, with respect to which inferences intelligent persons might well differ.

Moreover, the question was one of those which a jury is quite as likely to decide rightly as the court.

Several experts, called as witnesses for the defendant, were allowed to state their opinions as to what caused the

abortions, and the facts upon which their opinions were predicated.

In this instance, at least, the rules of evidence were liberally interpreted in favor of the defendant. With respect to the opinions expressed by such experts, I shall only remark, that after a careful consideration of the facts cited in support of their opinions, it appears to me that as many reasons can be given in support of the finding of the jury as against it.

It appeared in proof, that five of the animals lost their calves prematurely on the cars, within a day or two after the collision; that similar accidents to the number of 103, in both herds, occurred at short intervals during a period of ninety days, beginning with their arrival in Saline county. The greater number of abortions occurred within a comparatively short period after their arrival.

The testimony of all the experts tended to show that several abortions occurring in a herd, snch as these, would quite likely cause other cows to miscarry that had sustained no physical injuries, such latter abortions being the result of disease or contagion engendered by the miscarriage of other animals.

Judge Philips has already remarked that some of the abortions may reasonably be attributed to the collision because they were so closely related to it in point of time. He has further remarked, that the time within which an animal would drop her calf, in conseqnence of a physical injury, would, in each instance, be largely dependent on the nature of the injury, the state of pregnancy, and the constitution and temperament of the animal. I will further add, that such abortions as occurred so long after the collision that they can not reasonably be supposed to have resulted from physical injuries, may (as it seems from the testimony of experts) be attributed to a contagion existing in the herd, which was occasioned by the collision without fault of the plaintiffs.

On the other hand, it may be plausibly argued (as it was before the jury), that the abortions were in great part due to change of climate, or to fatigue, or injuries naturally incident to a long railroad journey, or to the plaintiffs' negligence in failing to isolate cows that had aborted.

The testimony in the case, however, tended to show that the ordinary incidents of a long railroad journey would not be liable to seriously affect a pregnant animal in that state of pregnancy which these cows appear to have reached.

After a careful review of all the testimony, I conclude that there was evidence in the case from which the jury might rationally conclude, as they did, and as a former jury appears to have found, that the abortions were the result of the collision. It may be conceded that the finding rests largely upon inferences that are, to a certain extent, uncertain, which the jury must have drawn; but that is not a sufficient ground for overruling the action of a jury, when it appears that tangible facts were established which furnished a reasonable basis for the opinion they may have formed.

I accordingly concur in the view that the motion for a new trial should be overruled, if the plaintiffs in case No. 2024 elect to remit that portion of the verdict that is in excess of the sum claimed in the petition.

BRIEF.

I.

Jurisdiction.

1. *a* The plaintiff in error had an agent and business office within the territorial limits of the state of Missouri, and was engaged in transacting business there, as shown by the sheriff's return, and could be sued in the courts of that state.

Balt. & Ohio R. R. Co. vs. Harris, 12 Wallace, 65.

LaFayette Ins. Co. vs. French, 18 Howard, 404.

Gibbs vs. Insurance Co., 63 N. Y., 114.

2 Morawetz on Corp., § 977.

McNichol vs. U. S. Mercantile Reporting Agency, 74 Mo., 457.

Writs of attachment were sued out in these actions, but no property was levied upon, and hence they stand as if instituted by summons alone. The corporation, having a business office and agent in the state of Missouri, was amenable to the jurisdiction of its courts. *McNichol vs. U. S. Mercantile Rep. Agency*, 74 Mo., 457. In *Railroad Co. vs. Harris, supra*, it was said: "The chief point of difference between the natural and artificial person is that the former may do whatever is not forbidden by law; the latter can only do what is authorized by its charter. It can not migrate, but it may exercise its authority in a foreign territory, upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it will consent to be sued there. *If it do business there, it will be presumed to*

have assented, and will be bound accordingly." The plaintiff in error opened its business office in the state of Missouri, and placed its agent in charge thereof, for the transaction of its business. It must be presumed to have known of and assented to the provisions of the statutes of said state, in reference to suits against foreign corporations having an agent and business office therein, and authorizing service of summons upon such agent in any such suits. It is not denied by the plaintiff in error that it was subject to suit in the Missouri courts, but it is contended that, as its business office was in the city of St. Louis, it was a *resident* of that city, and under the statute fixing the place of bringing suits, it could only be sued there.

b We insist that the circuit court of Saline county, Missouri, under the statutes of said state, had jurisdiction of the suits against said *non resident* or foreign corporation, notwithstanding its agent and business office were in the city of St. Louis, and not in Saline county; and that the service, in St. Louis, of the summons issued by the Saline circuit court, was valid; and that said foreign corporation comes within the provisions of the statute making *non residents* suable in *any* county of the state.

1 Revised Statutes of Missouri, 1879, p. 595, § 3481, and p. 596, § 3489.

Stone vs. Travelers' Insurance Co., 78 Mo., 655.

The U. S. Mutual Accident Insurance Co. vs. Reisinger, 43 Mo. App., 571–6.

Swallow vs. Duncan et al., 18 Mo. App., 622–630–1.

Farnsworth vs. Railroad Co., 29 Mo., 75–78.

The plaintiff in error, by establishing its business office in Missouri, subjected itself to suit in such of the state courts as the statutes conferred jurisdiction upon in such actions.

The plaintiffs below insisted that, by the practice act in force when these suits were brought, the said foreign corporation was suable in any county in the state.

In order to make this plain, it will be well to review the legislation upon the subject. Section 5, Art. 1, Revised Statutes of 1845, p. 805, in reference to the place of bringing suit, was as follows:

"SEC. 5. Suits instituted by summons shall be brought: first, when the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides and the defendant may be found; or, second, when the defendant is a non resident of the state, in any county *within which the defendant may be found.*"

The legislature, in 1849, adopted a new code, and by it made *non residents* suable in *any* county in the state, the words in italics in the above section, being stricken out. Session Acts of 1849, page 76, Art. 4, Section 1, is as follows:

"SEC. 1. Suits institituted by summons shall be brought: first, when the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found; when there are several defendants, and they reside in different counties, the suit may be brought in any such county, and a separate writ may be issued to each county against such of the defendants as reside therein; where there are several defendants, some residents and others non residents of the state, suit may be brought in any county in which any defendant resides; secondly, *if all of the defendants are non residents of the state, and an action will lie against them, it may be brought in any county.*"

This was continued in the subsequent revisions, and in 1879, which was the law in force when these suits were

brought, we find, 1 R. S., 1879, p. 595, section 3481, as follows:

"SEC. 3481. Suits instituted by summons shall, except as otherwise provided by law, be brought: first, where the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found; second, when there are several defendants, and they reside in different counties, the suit may be brought in any such county; third, when there are several defendants, some residents and others non residents of the state, suit may be brought in any county in which any defendant resides; fourth, *when all the defendants are non residents of the state, suits may be brought in any county;* fifth, any action, local or transitory, in which any county shall be plaintiff, may be commenced and prosecuted to final judgment in the county in which the defendant or defendants reside, or in the county suing, and where the defendants, or one of them, may be found."

If suits may be brought against non residents in *any* county, regardless of the county in which they *may be found*, it follows by necessary implication that the court in which the suit is brought may issue its summons to the county in which service can be obtained upon such non residents. Any other construction would make the change in the statute meaningless. For if the writ could only issue to the county where the court is held, the suit could only be brought in the county where defendant *could be found*, as provided in the Revision of 1845, and the change in the Revision of 1849 would amount to nothing. Such, however, was manifestly not the intention of the legislature. Since that change, suits against *non residents* may be brought in *any* county, and the summons may be served in any other county in the state, as well as in the county where the court is held. *Stone vs. Travelers' Insurance Co.*, 78 Mo., 655. *U. S. Mutual Accident Insurance Co. vs. Reisinger*, 43 Mo. App., 571.

The city of St. Louis is placed by our statutes upon the same footing as a county.

But it is contended by plaintiff in error, that it was a *resident* of the city of St. Louis, within the meaning of the statute, and could only be sued there. The Supreme Court of Missouri has held otherwise, and, in construing the practice act, has decided that a foreign corporation, doing business in the state, is a *non resident*, and in the absence of any *special* provision, comes within the terms of the statute in reference to the place of bringing suits against *non residents* found within the state; and that Section 3481, Revised Statutes, 1879, hereinbefore copied, authorized such suits to be brought in *any* county. In *Stone vs. Travelers' Insurance Co.*, 78 Mo., 665–8, the court said: "The defendant [the defendant being a foreign corporation doing business in the state] being a *non resident* of the state, was subject to suit in any county in this state, (R. S., 3481), and could be personally served in the manner pointed out by the section under consideration," which was Section 6013. This last section required foreign insurance companies, doing business in the state, to appoint an agent, upon whom service could be made in suits against them. Section 3481, referred to by the court, in the Stone case, is copied on page 40 of this brief. Counsel for plaintiff in error (page 38 of their brief) seem to concede, that the opinion in the Stone case determines the question in favor of our construction, but seek to avoid its effect by claiming that the reference to Section 3481, and the statement in the opinion, that foreign corporations came within the clause of said section relating to *non residents* were mere *obiter*, as Section 6013 expressly authorized suits against *foreign insurance companies* to be brought in *any* county, and hence it was not necessary to decide, as was done, that a foreign *corporation* was a *non resident*, within the meaning of Section *3481* of the general practice act. This is a mistake. The point was directly involved in the Stone case, and the

construction of Section 3481 was properly before the court. Section 6013 does *not* provide, where suits may be brought against foreign insurance companies, but simply requires such companies to appoint an agent upon whom service may be made, when said companies are sued in any of the courts of this state, or in the Federal courts sitting in this state, and leaves the *place of instituting suits* to be determined by the general law. That section only regulates the manner of service. It does not fix the forum in which the suits must be brought. Hence it was necessary in the Stone case, for the Supreme Court of Missouri to determine, as it did, whether a foreign corporation, doing business in this state, under Section *3481*, was to be sued as a *non resident* or *resident*, and it was held that such corporations were *non residents* within the meaning of that section. In accordance with the rules of this court, we here print Section 6013, in order that the court may see that it does not regulate the *place* of bringing suits, and in no manner interferes with Section 3481.

"SEC. 6013. *Foreign companies to have resident agent.* Any insurance company not incorporated by or organized under the laws of this state, desiring to transact any business by any agent or agents in this state, shall first file with the superintendent of the insurance department, a written instrument or power-of-attorney, duly signed and sealed, appointing and authorizing some person, who shall be a resident of this state, to acknowledge or receive service of process, and upon whom process may be served for and in behalf of such company, in all proceedings that may be instituted against such company, in any court of this state, or in any court of the United States in this state, and consenting that service of process upon any agent or attorney appointed under the provisions of this section, shall be taken and held to be as valid at if served upon the company, according to the laws of this or any other state; and such instrument shall furthermore

provide that such attorney's authority shall continue until revocation of his appointment is made by such company, by filing a similar instrument with said superintendent, whereby another person shall be appointed as such attorney. Such company shall have the right, from time to time, to change every appointment thus made by it; but until a new instrument is filed with said superintendent by such company, making such change or revocation, the attorney last appointed shall continue in authority, and remain the designated attorney of such company for the purpose of this chapter. If any attorney so appointed, shall absent himself from this state, or his usual place of abode or business, or secrete himself so that such process can not be served upon him, or shall have become disqualified from any cause whatever, or shall die, the superintendent of the insurance department shall immediately appoint an attorney for service for such company, of which notice, in writing, shall be immediately given to such appointee and also to the company, or its general agent or manager, which appointment shall be as valid as if made by the company, and shall remain in force until the company shall have made another appointment, in the manner required for an original appointment of such attorney. Service of process as aforesaid, issued by any such court, as aforesaid, upon any such attorney appointed by the company, or by the superintendent. as aforesaid, shall be valid and binding, and be deemed personal service upon such company, so long as it shall have any policies or liabilities outstanding in this state, although such company may have withdrawn, been excluded from, or ceased to do business in this state. Every such instrument of appointment executed by such company, shall be attested by the seal of such company, and shall recite the whole of this section, and shall be accompanied by a copy of a resolution of the board of directors or trustees of such company, similarly attested, showing that the president and secretary, or other chief officers of such company, are au-

thorized to execute such instrument in behalf of the company; and if any such company shall fail, neglect or refuse to appoint and maintain, within the state, an attorney or agent, in the manner hereinbefore described, it shall forfeit the right to do or continue business in this state."

That the Missouri courts do not regard as an *obiter dictum*, the ruling of the Supreme Court of that state in the Stone case, that a foreign corporation doing business in said state is a non resident within the meaning of Section 3481, *supra*, is apparent from *U. S. Mutual Accident Insurance Company vs. Reisinger*, 43 Mo. App., 571. The Kansas City Court of Appeals, in that case, was considering whether a justice of the peace could issue a summons to another county for a foreign corporation, doing business in the state, and it was held that he could not. In discussing the question, the court said (page 576): "Such authority is not expressly conferred and such extended jurisdiction will not be inferred. A more liberal indulgence will be awarded to courts of general jurisdiction, as was done in the case of *Stone vs. Insurance Co.*, 78 Mo., 655. But even in that case the court gave prominence to the fact that, *as the defendant was a non resident suit might have been brought in any county*. It will be observed that the statute, designating the place where suits shall be brought (when begun in the circuit or other courts of general jurisdiction), is quite different from that used in the justice act. In the former, if the defendant is a *non resident*, suits may be brought in *any* county of the state by Section *3481*, *Revised Statutes*, 1879; while in actions before justices, suits against non residents may be brought, not in any county of the state, but may be brought only before a justice in any county in this state where *defendant may be found*."

The Missouri courts, in the absence of any special provision to the contrary, have always treated foreign corpora-

tions as within the statutory provisions relating to non residents. In *Swallow vs. Duncan et al.*, 18 Mo. App., 630, it is said: "We are of the opinion that the service upon Capen, as the person authorized by the *non resident* corporation to acknowledge service of writs, in this state, was sufficient, &c." And again, page 631, "And the return of the officer was *prima facie* evidence of the *non residence of the corporation.*" In Farnworth's case, 29 Mo., 75–78, after discussing a special statute pertaining to corporations owning railroads terminating opposite a point in this state, and having the chief office in this state, it is said: "If there was no *other* provision on the subject, and the law permitted attachments simply on the ground of *non residence*, corporations could be attached on the same ground."

The Supreme Court of Missouri has expressly decided that a foreign corporation doing business in said state comes within the clause of Section *3481*, making *non residents* suable in any county, and this decision can not be evaded upon the ground that the opinion of the court upon that point is mere *obiter*.

This court will adopt the construction placed upon its own statute by the courts of the state.

The County of Lane vs. The State of Oregon, 7 Wall., 71.

Leffingwell vs. Warren, 2 Black, 599.

"State decisions construing the practice act of the state are binding upon the courts of the United States."

Railroad Co. vs. Hopkins, 104 U. S., 11.

See also, *Board of Supervisors vs. Post*, 104 U. S., 266.

Davie vs. Briggs, 107 U. S., 628.

Three judges of the United States courts, residing in the state of Missouri, have upheld the jurisdiction in these cases,

and their familiarity with the construction of, and practice under the state statutes entitles their opinion to weight upon this point.

The ruling of the Supreme Court of Missouri, that corporations created by other states do not become *residents* there, by engaging in bnsiness in said state, accords with the rulings of the Federal courts. In *ex parte Schollenberger*, 96 U. S., 337, it is declared that "a corporation can not change its *residence* or its citizenship." In *Myers vs. Murray*, 43 Fed. Rep., 695: "A corporation created under the laws of one state can not become a *resident* of another state, although doing business therein, so as to deprive it of the right to remove a cause to a Federal court from a state court." It is also held in that case that an averment, that the corporation was created by a state other than that in which the suit was brought, is a sufficient allegation that it is a *non resident* of the latter state. See also *Stephens vs. The Railway Co.*, 14 Lawyers' Reports, Annotated, 184, and cases cited in note. The plaintiff in error ought not to be held to be a *resident* within the meaning of the state statute, and a *non resident* under the Federal statute.

The cases cited from the Supreme Court of Missouri by the plaintiff in error, as the Farnsworth case, 29 Mo., 75, the Robb case, 47 Mo., 540, the Middough case, 51 Mo., 520, and other cases of that class, do not militate against the right to sue the plaintiff in error in any of the courts of said state under Section 3481. Those cases are all based upon a special statute applying to a *certain class* of foreign corporations. The statutes of Missouri contain a chapter in reference to domestic corporations. It provides how they may be organized, who may become stockholders, and sets out in detail the requirements as to the formation of such bodies. In this chapter, which relates wholly to domestic corporations, is a section as follows: "Section 750. Suits against corporations shall be commenced either in the county where the cause of

action accrued, or in any county where such corporation shall have or usually keep an office or agent for the transaction of their usual and customary business." There is also a section in the same chapter, providing the manner in which a summons shall be served upon such corporations. In the same article are provisions for winding up corporations, suing stockholders, electing directors, &c. The legislature, in that chapter, was making regulations for domestic corporations. See opinion of Philips, J., *supra*. Then there is another section, which has been amended several times, and is now Section 3497, which is as follows: "All railroad corporations that own or operate roads terminating opposite to any point in this state, and which have offices or places of business in this state, *shall be sued in the same manner as railroad companies chartered by this state.*" The cases cited by plaintiff, and referred to above, are predicated upon that statute in its present or original form. The plaintiff in error does not come within the terms of said section, as stated in its motion to quash the return. It does not own or operate a railroad terminating opposite any point in this state.

Said section does not make the corporations referred to therein *residents*, but simply declares that such corporations shall be sued in the same manner as provided by law in reference to domestic corporations, concerning which there is a *special statute*, as above stated. The only sections of the statute, which pertain to suits against the plaintiff in error, however, are Section 3481, *as to the place of bringing suits*, and which has been hereinbefore copied (page 40), and Section 3489, *as to manner of serving process*, and which is as follows: "Section 3489. *Writ, how served upon persons and foreign corporations.* A summons shall be executed, except as otherwise provided by law, either: first, by reading the writ to the defendant, and delivering to him a copy of the petition; or, second, by delivering to him a copy of the petition and writ; or, third, by leaving a copy of the petition

and writ at his usual place of abode, with some member of his family over the age of fifteen years; or, *fourth, where defendant is a corporation or joint stock company, organized under the laws of any other state or country, and haviny an office or doing business in this state, by delivering a copy of the writ and petition to any officer or agent of such corporation or company, in charge of any office or place of business, or if it have no office or place of business, then to any officer, agent or employe* IN ANY COUNTY WHERE SUCH SERVICE MAY BE OBTAINED; or, fifth, where there are several defendants, by delivering to the defendant who shall be first summoned, a copy of the petition and writ, and to such as shall be subsequently summoned, a copy of the writ; or by leaving such copy at the usual place of abode of the defendant, with some person of his family over the age of fifteen years; sixth, where any action shall be commenced against any county, a copy of the original summons shall be left with the clerk of the county court fifteen days, at least, before the return day thereof, and all copies of said writ shall be made without fee or charge by the officer serving the same."

The plaintiff in error was a non resident, and the suits were properly brought against it in Saline county, under Section 3481, and the service correctly made, under the fourth subdivision of Section 3489, above.

2. Again, the plaintiff in error waived any objection to the service of the summons, by appearing in the state court, and filing petition for the removal of the causes to the Federal court. In *Bushnell vs. Kennedy*, 9 Wall., 387, this court said: "It is true, indeed, as was said in argument that the section provides that after removal, the cause shall then proceed in the same manner as if it had been brought by original process; but we can not recognize the validity of the inference that the defendant, before pleading in the circuit court, may move to dismiss the suit for want of jurisdiction. This construction would enable the non resident defendant, in a

state court, to remove the suit against him into a circuit court, and then, by simple motion to dismiss, defeat the jurisdiction of both courts. Such a construction, unless imperatively required by the plain language of the act, is wholly inadmissible. And it is clear that the language of the act does not require it. Its plain meaning is, that the suit shall proceed, not that it shall proceed unless defendant moves to dismiss. The defendant is not in court against his consent, but by his own act, *and the suit is to proceed as if brought by original process, and the defendant had waived all exception to the jurisdiction and pleaded to the merits.*

Under the eleventh section, the exception to jurisdiction is the privilege of the defendant, and may be waived, for the suit is still between citizens of different states, and the jurisdiction still appears in the record. *The first* act of the defendant, indeed, under the twelfth section, is something more than consent, something more than a waiver of objection to jurisdiction, it is a prayer for the privilege of resorting to Federal jurisdiction, and *he can not be permitted afterwards to question it.*" *Sayles vs. Northwestern In. Co.*, 2 Curtis C. C., 212, is cited with approval in the above case. In the Sayles case there was a special appearance in the state court, with a petition for removal, and it was held too late to object in the Federal court to the service; that all objections thereto were waived.

See, also, *Tallman vs. R. R.*, 45 Fed. Rep., 156.

Edwards vs. Ins. Co., 20 Fed. Rep., 452.

Water Co. vs. Baskin, 43 Fed. Rep., 323.

Morris vs. Graham, 51 Fed. Rep., 53.

In *West vs. Aurora City*, 6 Wall., 139, it was said: "A suit removable from a state court must be a suit regularly commenced by a citizen of the state in which the suit is brought, by process served upon defendant who is a citizen

of another state, *and who, if he does not elect to remove, is bound to submit to the jurisdiction of the state court.*" Plaintiff in error by appearing and removing the cases to the Federal court, should be held to have admitted that the state court had obtained jurisdiction over it.

3. The plaintiff in error, having filed its answer and tried the cases upon their merits, can not now be heard to say that it was never notified of the suits, and that the court below had no jurisdiction. The suits were between citizens of different states. The lower court had jurisdiction of the subject matter, and after appearing to the merits, it is too late to raise an objection to jurisdiction over the person. Under the Missouri practice, this is true, notwithstanding the answer was not filed until an objection to the service of the summons had been overruled. "True, the appellant filed its motion to dismiss; which was overruled, and exceptions duly saved thereto; but the rule to be deduced from the cases is, that there should have been no further appearance, in order to secure the benefit of the objection. It could not consistently appear and save exceptions to the jurisdiction and then proceed with the trial of the cause in a court possessing no jurisdiction over the person, when, by the very act of appearing further, the requisite jurisdiction was conferred. A party must either appear at the trial and abide the consequences or not appear at all."

Kronski vs. Mo. Pacific R'y Co., 77 Mo., 362.

Tower vs. Moore, 52 Mo., 118.

Hulett vs. Nugent, 71 Mo., 131.

Fugate vs. Glasscock, 7 Mo., 577.

Baker vs. Railway Co., 107 Mo., 230–239.

Scoville vs. Glassner, 79 Mo., 449.

This court also said, in *Harris vs. The Railway*, 12 Wall.,

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Section 914, Revised Statutes U. S.

Robertson vs. Perkins, 129 U. S., 233.

Sabin vs. Kenney, 103 U. S., 289.

The President, &c., vs. Lowry, 103 U. S., 72.

Bell vs. The Mayor, 23 Howard, 443.

In re-application of Secretary of the Treasury to Acquire Lands, 11 Lawyers' Reports, 275, Annotated, and cases cited in note.

See, also, as to appearance—

Fitzgerald & Mallory Contsruction Co. vs. Fitzgerald, 137 U. S., 98.

Also, *Wedekind vs. Southern Pactfic Co.*, 36 Fed. Rep., 279–281.

The plaintiff in error, after having had two trials upon the merits in these cases, ought not to be heard to say, that it was never notified of the suits; and after stubbornly contesting them for nearly a decade, it can not now claim that it was never in court; that the cases ought to have reached the United States Circuit Court from the city of St. Louis, instead of from the circuit court of Saline county. The objection is without merit.

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II.

First and Second Paragraphs of Charge.

We will consider the errors assigned by plaintiff in error in the order in which they are presented in the brief in its behalf. The first complaint selects two or three sentences of the charge and predicates an objection thereon. The court, in unmistakable terms, told the jury that the railroad company was only liable for the damages directly traceable to its negligence. This was *reiterated* and *emphasized* in different parts of the charge, and made prominent therein. It would be impossible to read the charge of the court below, and come to the conclusion that any one could have been misled by the sentences complained of. It would not be a difficult matter to select passages from almost any charge, which, taken away from the context, would fail to express fully the law applicable to the whole case. Therefore the entire charge is to be taken together. The rule announced by this court is, that a judgment is not to be set aside "because the charge of the court may be open to some verbal criticism in particulars, considered apart by themselves, which could not, when taken with the rest of the charge, have misled a jury of ordinary intelligence."

Chicago & N. W. R'y Co. vs. Whitton, 13 Wall., 270.

III.

Third Paragraph of Charge.

It is contended by the plaintiff in error that the court should have directed the jury, that the value of the cattle, when delivered at the western terminus of *its* railroad, and not their value at their final destination in Saline and Howard counties, should be the basis upon which to estimate the damages. There are three reasons why this objection to the charge is untenable.

1. This point is made for the first time in this court. No such claim was advanced in the court below. Both parties introduced their evidence, and tried the cases, upon the theory that the value of the cattle in Saline and Howard counties, was the proper basis for fixing the damages. No objection was interposed by the defendant below, to the evidence of value at the point of final destination, but upon the contrary, it was conceded that it was proper to base the damages upon the value of said cattle at said place. On page 135 of the record, evidence was offered as to the value of the animals in the condition in which they arrived, and what their value would have been if they had not been injured in transit.

Then follows (pages 136, 137 and 138, printed record,) objections to the evidence upon the part of the defendant below. *No objection was made on the ground that the testimony was not confined to the value of the animals at the terminus of defendant's road.* On the contrary (page 138, printed record,) the court said: "Inasmuch as the damage complained of consisted in part, in the fact, that certain of these cattle lost their calves, it appears to me to be competent to show what the difference in value was in the fall of 1883, *when these cattle arrived in Saline or Howard counties*, between an animal that was then with calf, and liable to have a calf

within the next two or three months, and one that had aborted its calf." Counsel for plaintiff in error said: "*I concede that, unless it appears that they have (not) the power to prove its value exactly,*" and on page 137 (printed record), in answer to a statement of a similar rule by the court, counsel for plaintiff in error said: "I would concede that to be the exact rule, if we had equal means of getting at this testimony," &c. (See, also, printed record, page 154.) Both parties introduced their evidence upon that theory, and no question was raised about it, and it does not appear anywhere in the record, that the plaintiff in error made any objection thereto. No evidence was offered by either side as to the value of the cattle at the terminus of the railroad of the plaintiff in error.

The plaintiff in error introduced its evidence upon that basis. On page 410 of printed record, counsel for plaintiff in error asked one of its witnesses as follows: "Q. What, in your opinion, was the value of that lot of cattle on Estill's farm, or at Kansas City, assuming that they were in good order?"

And again (page 413, printed record): "Q. What would you say was a fair price for those cattle per head where they were [that is, on Leonard's farm], or at Kansas City, assuming them to be in good condition and recovered from the effects of the trip?"

See, also, page 234 (printed record), as to agreement that the damages should be assessed when the cattle reached Missouri.

All through the record it will be seen that both parties, without objection or question, introduced evidence as to the value of the cattle in Missouri, and that no evidence was offered by either party as to their value at the terminus of the New York, Lake Erie & Western railroad. The opinions

rendered upon the motion for a new trial, show that no such question was *then* presented.

A party will not be allowed to try a case upon one theory in the lower court, and adopt a different one in the appellate court. "It is a general rule, that questions not made on the trial or presented to the court below, for decision, can not be entertained here."

Union Pacific R'y Co. vs. Myers, 115 U. S., 1.

Flournoy vs. Lastrapes, 98 U. S., (Law ed., book 25, 406).

Morrill vs. Jones, 16 Otto, 466–7.

Crescent M'f'g Co. vs. Nelson M'f'g Co., 100 Mo., 325.

Capitol City Bank vs. Armstrong, 62 Mo., 59.

2. The plaintiff in error had full knowledge that the cattle were to be transported to Missouri, and were intended for that market (pp. 340–341–234, printed record). It undertook to carry them with reference to that fact, and should be held liable for the actual loss sustained, which was the difference between their value in Missouri, where they were to be delivered to the plaintiffs below, in the condition in which they arrived, and their value in the condition in which they would have arrived, but for the injury sustained through the negligence of the plaintiff in error.

3 Sutherland on Damages p. 246

Ward vs. New York Central R. R. Co., 47 N. Y., 29.

1 Sedgwick on Damages, 8 ed., Sec. 164, p. 234.

2 Sedgwick on Damages, 8 ed., Sec. 739, p, 432.

Marshall vs. New York Central R'y Co., 45 Barb., 502.

Erie Railway Co. vs. Lockwood, 28 Ohio State, 358.

Sisson vs Railway Co. 14 Mich 489

3. There is no evidence that there was any difference in the market value of the cattle at the terminus of the railroad of plaintiff in error, and the value thereof at the point of final destination. In discussing a similar question, in *Marshall vs. N. Y. Central R'y Co.*, 45 Barb., 502–9, the court said: "If there was any difference in value between the two places, or the property was injured or depreciated after it left Albany, the defendants might have proved it. There is not in the case any proof of the kind, nor any suggestion to that fact; and for aught I can see in the case, I think it would have been entirely proper for the circuit judge to have instructed the jury that they might find the value of these apples to be their value as proved in New York, deducting freight upon them from Albany to New York, and make any other allowance which they thought proper for the difference in value between the two places." In the case at bar, there was no evidence of any difference in the value of the cattle, between the terminus of the railroad of plaintiff in error and the value of the same in Howard and Saline counties.

In *Wemple vs. Steward*, 22 Barb., 154, the objection was made that the referee erred in receiving evidence of the price of plank at any other place than the place of delivery. The court said, where there is no evidence of the value of the goods at the place of delivery, evidence is admissible of their value at other places, &c.

IV.

Measure of Damages.

1. It is next contended by plaintiff in error that, if the proper measure of damages, is the difference between the market value of the cattle in the condition in which they arrived, and their market value in the condition in which they would have arrived, but for its fault, this value must be fixed at the time, when the cattle first reached their destination, "and that is the final test of the damages, and that plaintiff could not go further, and show that subsequently some of the cattle died." It is further suggested, that *two* rules were adopted, by which plaintiffs were enabled to recover; first, the difference between the market value of *all* the cattle in the condition in which they *arrived;* and, second, in addition thereto, the value of those that subsequently died. This is based upon a misconception of the record, and the ruling of the court. The market value of the cattle at their destination would depend upon their condition when they reached said place. If some of the animals had received fatal wounds in the collision, although the character and extent thereof may not have been discovered until an hour, a day, or a week, after they were unloaded from the cars, proof that death subsequently resulted from the injuries, would simply show the real condition in which such animals reached their destination. It would not establish any new injury or any additional damage. It would only show what the real damage, at the time of the delivery of the cattle, was. The plaintiffs were permitted to prove that some of the cattle were so badly injured, when delivered to them, that they subsequently died from the effect of such injury, and hence, were of no value when received. There was no double assessment as to these animals. The charge of the court (p. 502, printed record), clearly points out the different items of damage.

There is nothing in the record to indicate, and it certainly can not be presumed, that the jury under this charge, assessed the damages upon these animals upon the basis that their value was *depreciated*, and then afterwards made allowance for the *same cattle*, upon the ground that they were totally worthless. The defendant was permitted to show that some of the cattle were not as badly injured as they appeared at first to be. See as to bull "Lord William," (p. 519, printed record).

All of this evidence tended to show the condition and value of the cattle when they reached their destination.

Judge Philips, in his well-considered opinion, upon this point, says: "The rule as to the measure of damages permits the plaintiffs, up to the time of the trial, to show the condition of the injured animals merely as a means of ascertaining the result of the injury inflicted, so as to better enable the jury to fix the damages, at the time and place of delivery. If the cows did subsequently abort, this is proof only of the extent of the injury inflicted, as much so as if they had subsequently died from the effects of the collision. The only known limit to the inquiry, up to the trial is, whether or not the subsequent development in the condition of the animal, is traceable directly to the injury inflicted by the carrier." In *Mo. Pacific Railway vs. Edwards*, 14 S. W. Rep., 607, the court said: "The fact alone, that the cattle died after their delivery at the point of destination, would not relieve the appellant of liability. The true test of its liability in this connection, would, we think, depend upon whether the death of such cattle was the result solely of injuries received by reason of the appellant's negligence while transporting them." In *Lake Erie & W. R. Co. vs. Rosenberg*, 31 Ill. App., 47, it was held that in an action against a railroad company to recover damages for failure to unload as agreed, evidence as to their condition immediately after liber-

ation from the cars; and also, as to their condition thereafter, was properly admitted. See, also, *Wilcox vs. Plummer*, 4 Peters, 172.

The court below did not permit the plaintiffs to prove the stiffness, soreness, &c., of the whole herd, but required witnesses to state the specific injuries, that it might be seen that they resulted from the wreck (page 156, printed record), and also permitted plaintiffs and defendant, as above stated, to show the condition of the animals subsequent to their arrival, in order to show how seriously they were hurt by the collision.

2. The measure of damages was properly stated by the court, in the charge to the jury. The difference between the market value of the cattle, in the condition in which they would have arrived, but for the fault of the railroad company, and their market value in the condition in which they did arrive, by reason of its negligence, constitutes the amount of plaintiff's loss. There is no reason why a special rule should be made for this case.

Mo. Pacific R'y Co. vs. Fagan, 72 Texas, 127.
Mo. Pacific R'y Co. vs. Edwards, 14 S.W. Rep., 607.
Hutchison on Carriers, 2d ed., § 770 *a* and § 221.
Mobile & M. R. R. Co. vs. Jurey, 111 U. S., 584.
Smith vs. Griffith, 3 Hill, 333.
McCune vs. Railway Co., 52 Iowa, 600.
Sturgess vs. Bissell, 46 N. Y., 462.

It is not material whether plaintiffs intended to keep the cattle upon their farms for breeding purposes, or to sell them upon the market. "This mere unexecuted intention, if it existed, amounted to nothing. It bound nobody." The depreciation in the value of the cattle was the same, whether they intended to sell or keep them on their farm.

Smith vs. Griffith, 3 Hill, 333.

V.

Abortions.

1. Many of the cattle that were in the wreck, were heifers which were bred in Scotland, and were in calf when imported to this country. Plaintiffs claimed that a number of these heifers prematurely cast their calves, in consequence of the collision, and that their value was thereby greatly depreciated. The court instructed the jury that the burden was upon the plaintiffs to show that these abortions were the direct result of the collision. The jury so found. A previous jury arrived at the same conclusion, upon substantially the same evidence. The trial judge refused to interfere with the verdict, and in this ruling Judge Philips concurred. If the question was submitted to this court upon the *weight* of the evidence, we respectfully submit, that the verdict of the jury should be sustained. The evidence was abundant to show that the verdict was a proper one. Plaintiff's evidence showed (pp. 55 and 56, printed record,) that there were no abortions before the cattle reached Nankin; and that the Paris-green, referred to by plaintiff in error, was eaten by some of the cattle, two or three weeks before they started west; and that only thirty or thirty-five had access to same, and that all, except the five that died, had fully recovered from its effects, more than two weeks before their shipment to Missouri. None of the Estill & Elliott cattle ate the Paris-green, and they were not with the Leonard cattle, but were a quarter of a mile away, (p. 230, printed record). There were no abortions on the train before Nankin was reached. Almost immediately after the collision, the heifers began to lose their calves, and at least five abortions occurred on the cars, before they reached their destination, and others followed immediately upon their arrival. The first occurred in the Estill & Elliott herd. The cattle were fed in the same manner as

other cattle that did not abort. The time when an abortion would occur would depend on the nature and extent of the injury, the violence to the region of the womb, the state of pregnancy, and in some animals would occur sooner than in others. There was evidence that such abortions would not result from an ordinary railroad journey; and also, that shocks and injuries, such as these cattle sustained, would be likely to produce in them. The cause of the abortions was peculiarly a question for the jury. There was certainly evidence to sustain their finding.

"This court has no concern on a writ of error with questions of fact, or whether the finding of the jury accords with the weight of the evidence."

Zeller vs. Eckert, 4 How., 289.

U. S. Express Co. vs. Ware, 20 Wall., 543.

Lancaster vs. Collins, 115 U. S., 222.

Chicago & N. W. R. R. vs. Ohle, 117 U. S., 123.

2. It was not necessary to show that the railroad company had notice, at the time of the shipment, that the heifers were in calf, in order to render it liable for the depreciation in their market value in consequence of the abortions caused by its negligence. It was not claimed by the plaintiffs below that, on account of the condition of the cattle, any *special care* or *precaution* was necessary in transporting the same, and the suit was not brought on account of the absence of any *such special attention or extra precaution*. The same negligence would have rendered the carrier liable for damages to any other stock, that it might have been transporting. So notice was not necessary, on the ground that the condition of the animals required unusual care. This is an action for breach of the railroad company's duty, as a common carrier. "As a general rule, and in the absence of fraud and imposition, a common carrier is answerable for the loss of a pack-

age of goods, though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them."

Hart vs. Penn. R. R. Co., 112 U. S., 331–340.

New York Central & Hudson River R. R. Co. vs. Fraloff, 100 U. S., 24.

"It is settled, that when the carrier has not given notice that he would not be answerable beyond a specified sum, unless informed of value, it is not the duty of the shipper to state the quality or value."

3 Sutherland on Damages, 191.

Baldwin vs. The Liverpool & Great Western Steamship Co., 74 N. Y., 125.

In case of an injury received upon a railroad by a cow in calf, in *McCune vs. B. C. & N. R. R. Co.*, 52 Iowa, 600, the court said: "It would certainly be most unreasonable to require shippers of live stock to seek the agent of the carrier and make known the physical condition of his stock, and for failing to do this, discharge the carrier from all liability for negligence. As well require each passenger, upon purchasing his ticket, or upon boarding the train, to make known his physical condition, so that the carrier might exercise more care in running the train to avoid collisions, or accidents from other causes." See, also—

Brown vs. Railway, 41 American Rep., 41–49.

Stewart vs. Ripon, 38 Wis., 591.

3. The court laid down the correct rule of damages, as to the heifers that aborted their calves. If, through the car-

rier's negligence, the heifers lost their calves, the difference between their market value, if they had arrived in calf, and their market value, having lost their calves, would constitute the amount of plaintiffs' damages. This injury to the animals stands upon the same basis as any other physical injury. The value of the heifer was depreciated in consequence of the abortion, and this depreciation in value that was brought about by the fault of the carrier. In *Missouri Pacific R'y Co. vs. Fagan*, 72 Texas, 127, the same rule was announced as in the case at bar. "The measure of damages for the total loss of mares with foal, shipped by a railroad company, is the price they would have brought in the market, at the place of destination, in the condition they would have been in, had the company exercised due and necessary care of them while in its possession, less the freight. In case of partial loss, the measure of damages is the difference between such price, less the freight, and their value at such destination at the time of their arrival." In that case, as in this, the proof showed that the animals were greatly depreciated in value by the injury.

McCune vs. The Railway, 52 Iowa, 600.

The rule adopted by the court below is the general one, and, in fact, counsel for plaintiff in error do not seem to question it, except that they insist that a special rule should be made for this case. It is claimed that the plaintiffs below ought to have traced each animal, and to have shown the amount received for it. This was answered by the trial court as follows (page 137, printed record): "If they were to show that all these cattle that lost their calves were sold for $30 or $50 or $10 each, you might, with reason, insist, that that was not the proper criterion of value, because they may have sold them for less than they would have got for them in the open market—"

Mr. Pollard: "That is just what they have been doing."

* * * * * *

The Court: "That demonstrates that we must adhere to the fixed rules of law. Inasmuch as the damages complained of consisted, in part, in the fact that certain of these cattle lost their calves, it appears to me to be competent, to show what the difference in value was, in the fall of 1883, when these cattle arrived in Saline or Howard county, between an animal that was then with calf, and liable to have a calf within the next two or three months, and one that had aborted its calf."

The price for which the cows were sold, cannot determine the damages. Plaintiffs below may have received more or less than the market value. What the plaintiffs sold the animals for, might have been brought out by defendant, to contradict the statement as to the market value, but plaintiffs could not bind the defendant by the prices for which they were sold. The impracticability of adopting such a rule as plaintiff in error suggests, is manifest, and is clearly pointed out, in the opinions rendered upon the motion for a new trial. Many of these cows were kept for months. Some were traded for ponies, and the ponies sold at a loss. Others were sold with a warranty, that they would become breeders, and were afterward taken back. Some were shipped from point to point in western territories and sold. How would the damages be assessed, upon such a basis as plaintiff in error suggests? In cases where the trades brought plaintiffs in debt, would the Railroad Company have to make the deficit good? When the animals were shipped to other states and territories, would defendant have to pay for the time of plaintiffs, the expenses, &c., of keeping and selling the animals? An attempt to make a new rule for this demonstrates the impracticability of adopting any other than the general rule followed by the court below.

The damages were not for injury to the reputation of the heifers as breeders, as suggested by counsel for plaintiff in error. They received a physical injury, and, in the market, in consequence of that injury, would only sell for a certain sum, whereas, without that injury, they would have sold for a largely increased price. The difference between these sums, is the amount of plaintiffs' loss. The cow receives a physical injury, which renders her less valuable—the same as an injury to a bull. The evidence showed that a cow with calf was worth a certain sum in the market, and the same cow, after aborting her calf, was worth a less sum. Where this injury was the result of the negligence of the railroad company, it should be liable for the difference in value caused by the injury.

The suggestion, in the brief of counsel for plaintiff in error, that some of the cows did not abort until after their arrival at their destination, has been referred to in point IV. of this brief. The injuries were received prior to their arrival, and they were only worth, when they reached their destination, what a cow, having received injuries which would cause an abortion, would sell for in the market.

1 Sutherland on Damages, 187.

VI.

Interest.

There was no error in the action of the court, in allowing the plaintiff interest upon the damages assessed.

"It is a general rule, that when goods are delivered by a common carrier, according to contract, the measure of damages is the value of the goods, with interest from the day they should have been delivered, less freight, if unpaid."

Gray vs. Missouri River Packet Co,, 64 Mo., 47.

Dunn vs. Hannibal & St. Joe R. R. Co., 68 Mo., 268.

Mobile & M. R. R. Co. vs. Jurey, 111 U. S., 584.

Hutchinson on Carriers, 2 ed., 771.

1 Sutherland on Damages, pp. 114 and 629.

We respectfully submit that there was no error in the rulings of the court upon matters of law, and that the verdicts are amply supported by the evidence, and that the judgments should be affirmed.

W. M. WILLIAMS,
JOHN COSGROVE,
O. GUITAR,
SAMUEL BOYD,
Attorneys for Defendants in Error.

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Transcripts
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Supreme Court U. S.

147 U. S.

449 - 591

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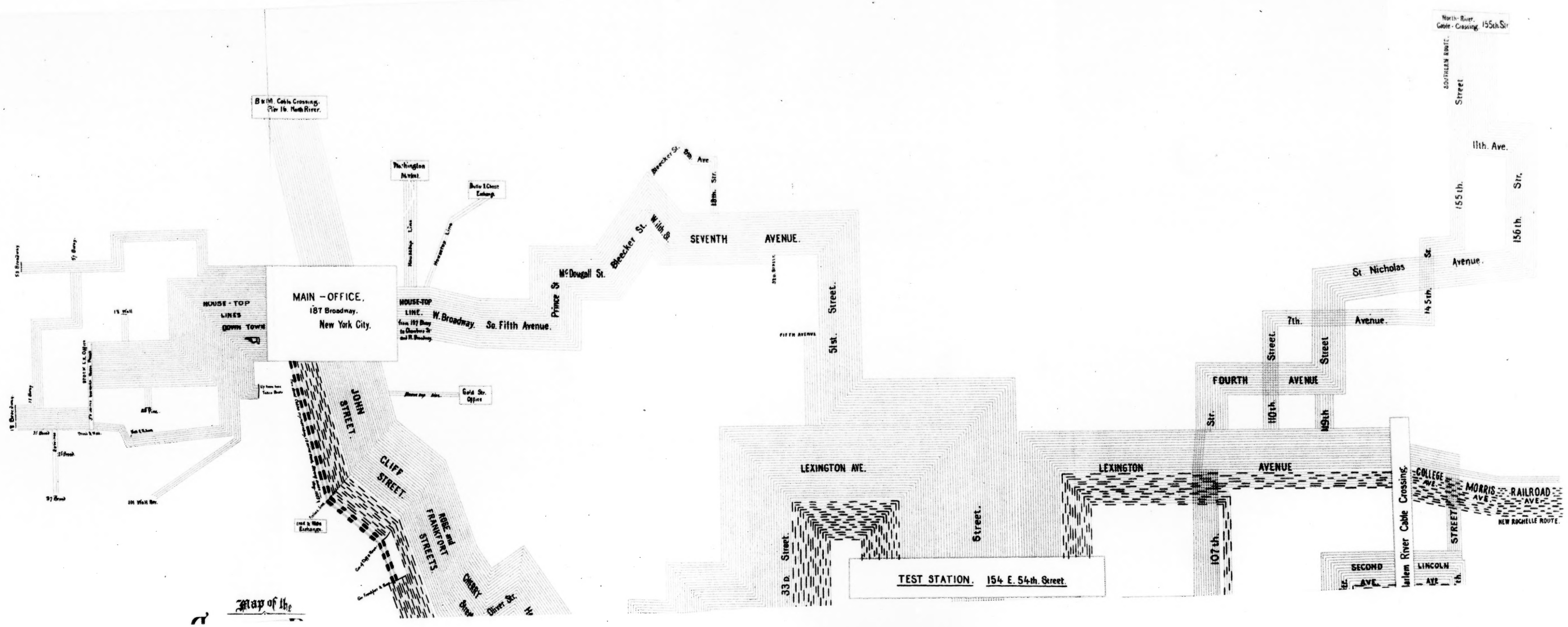


MAIN - OFFICE.
187 Broadway.
New York City.
HOUSE - TOP LINES DOWN TOWN
HOUSE-TOP LINE.
W. Broadway.
So. Fifth Avenue.
Prince St
McDougall St.
Bleecker St.
Wilth St.
SEVENTH AVENUE.
51st. Street.
JOHN STREET.
CLIFF STREET.
ROSE and FRANKFORT STREETS.
CHERRY
Oliver Str.
LEXINGTON AVE.
33 D. Street.
Street.
TEST STATION. 154 E. 54th. Street.
LEXINGTON AVENUE
107th.
FOURTH AVENUE
110th. Street.
119th. Street
7th. Avenue.
St. Nicholas Avenue.
145th. St.
155th.
156th. Str.
11th. Ave.
Street
North River Cable Crossing. 155th. Str.
SOUTHERN ROUTE.
Harlem River Cable Crossing.
COLLEGE AVE.
MORRIS AVE.
RAILROAD AVE.
NEW ROCHELLE ROUTE.
SECOND AVE.
LINCOLN AVE.
Map of the

B.

IOWA.

MINN.

WISCONSIN

ILLINOIS

MICHIGAN

LAKE MICHIGAN

CHICAGO

LAKE HURON

GEORGIAN BAY

LAKE ERIE

LAKE ONTARIO

NEW YORK

PENNSYLVANIA

VERMONT

NEW HAMP.

ME.

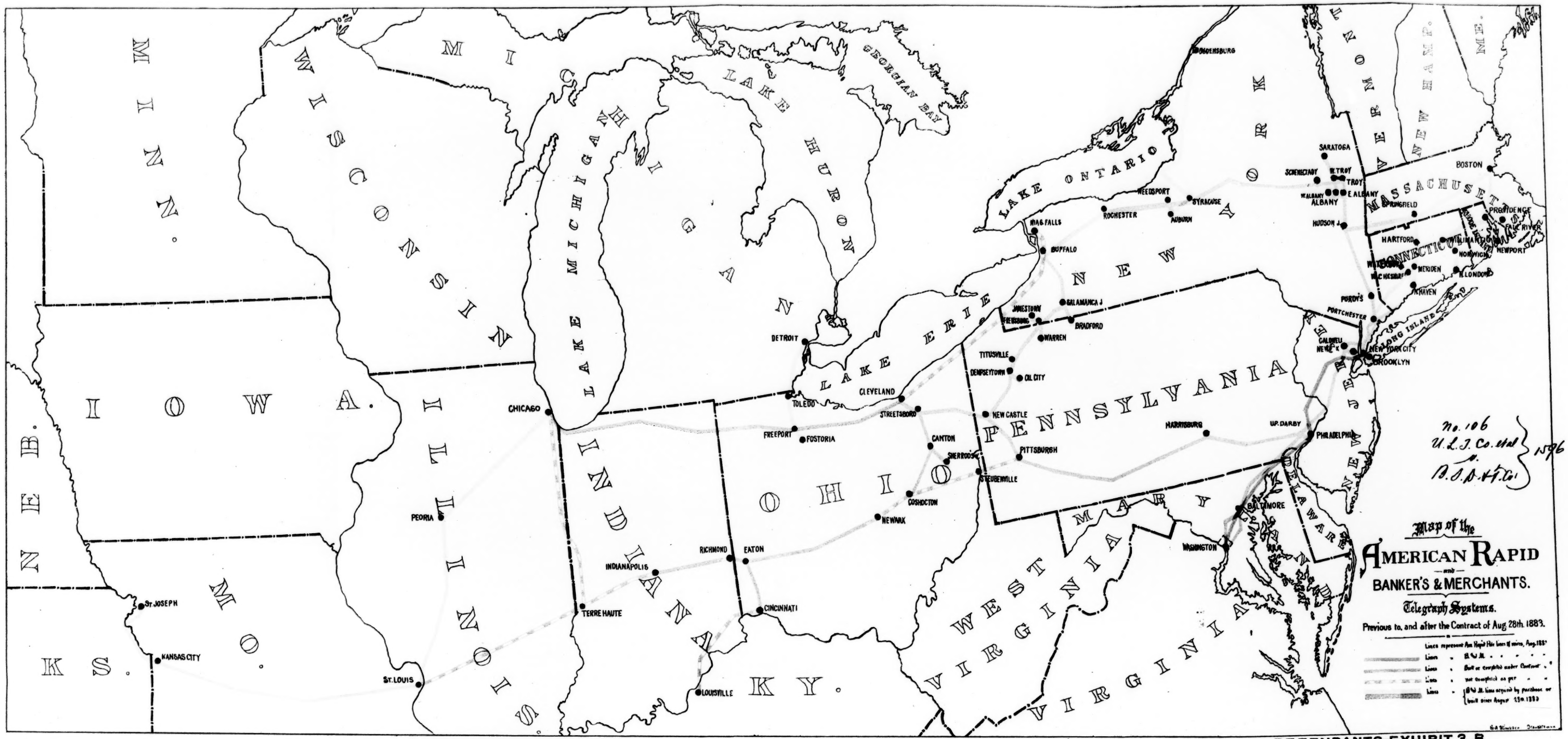
MASSACHUSETTS

CONNECTICUT

RHODE ISLAND

LONG ISLAND

FREEPORT
FOSTORIA
TOLEDO
DETROIT
CLEVELAND
STREETSBORO
CANTON
NEW CASTLE
TITUSVILLE
DEEPSTOWN
OIL CITY
JAMESTOWN
WARREN
BRADFORD
SALAMANCA
BUFFALO
NIAGARA FALLS
ROCHESTER
REEDSPORT
AUBURN
SYRACUSE
WATERTOWN
SCHENECTADY
TROY
ALBANY
SARATOGA
HARRISBURG
UP. DARBY
PHILADELPHIA
PORTCHESTER
PEEKSKILL
NEW YORK CITY
BROOKLYN
HARTFORD
SPRINGFIELD
BOSTON
PROVIDENCE
NEWPORT
NORWICH
NEW LONDON
MERIDEN
WATERBURY
NEW HAVEN
BRIDGEPORT
STAMFORD
GREENWICH



No. 106
U.L.I. Co. et al
v.
B.S.D. & T. Co.
1596

~~DEFENDANTS EXHIBIT 3.B.~~

Complainants Exh bt D.R.1

U.S. Circuit Court
filed Jan 18 1889
[illegible]

No. 106.
U.L.I. Coll. } p. 1597
B.A.B.H.T.C.

DETROIT. MICH.
TOLEDO Ohio.
CHICAGO. Ills.
PEORIA Ills.
FREEPORT Ohio.
FOSTORIA Ohio.
CLEVELAND Ohio.
STREETSBORO Ohio.
CANTON Ohio.
TERRE HAUTE Ind.
INDIANAPOLIS. Ind.
RICHMOND Ind.
EATON Ohio.
NEWARK O.
COSHOCTON Ohio.
STEUBENVILLE Ohio.
ST JOSEPH Mo.
KANSAS CITY Mo.
ST LOUIS Mo.
LOUISVILLE Ky.
CINCINNATI. Ohio.
NIAGARA N.Y.
BUFFALO N.Y.
ROCHESTER N.Y.
WEEDSPORT N.Y.
SYRACUSE N.Y.
SCHENECTADY JUNC. N.Y.
SARATOGA SP. N.Y.
SCHUYLERVILLE N.Y.
WEST TROY. N.Y.
TROY N.Y.
ALBANY N.Y.
EAST ALBANY N.Y.
W. ALBANY N.Y.
AUBURN N.Y.
SALAMANCA N.Y.
BRADFORD Pa.
JAMESTOWN N.Y.
FREMSBURY N.Y.
WARREN Pa.
TITUSVILLE
BEMPSETTOWN Pa.
OIL CITY Pa.
NEW CASTLE Pa.
PITTSBURGH Pa.
HUDSON Jc.
SPRINGFIELD Mass.
BOSTON Mass.
HARTFORD Conn.
WILLIMANTIC Conn.
PROVIDENCE. R.I.
FALL RIVER Mass.
PURDY'S N.Y.
WATERBURY Conn.
PORTCHESTER JUNCTION. N.Y.
WEST-CHESHIRE Conn.
MERIDEN. Conn.
NORWICH Conn.
NEW LONDON Conn.
NEWPORT R.I.
NEW HAVEN Conn.
NEW YORK CITY, N.Y.
HARRISBURGH Pa.
PHILADELPHIA. Pa.
BALTIMORE, Md.
WASHINGTON, D.C.

EXPLANATIONS—

Map of the
AMERICAN RAPID
—AND—
BANKER'S & MERCHANTS.
Telegraph Wires.
Previous to, and after the Contract of Aug. 28th 1883.

~~DEPENDANTS EXHIBIT 2.B.~~
Complainant Exhibit D. R. 2

U.S. Circuit Court
Filed Oct 18 1887
John A. Shields
Clerk

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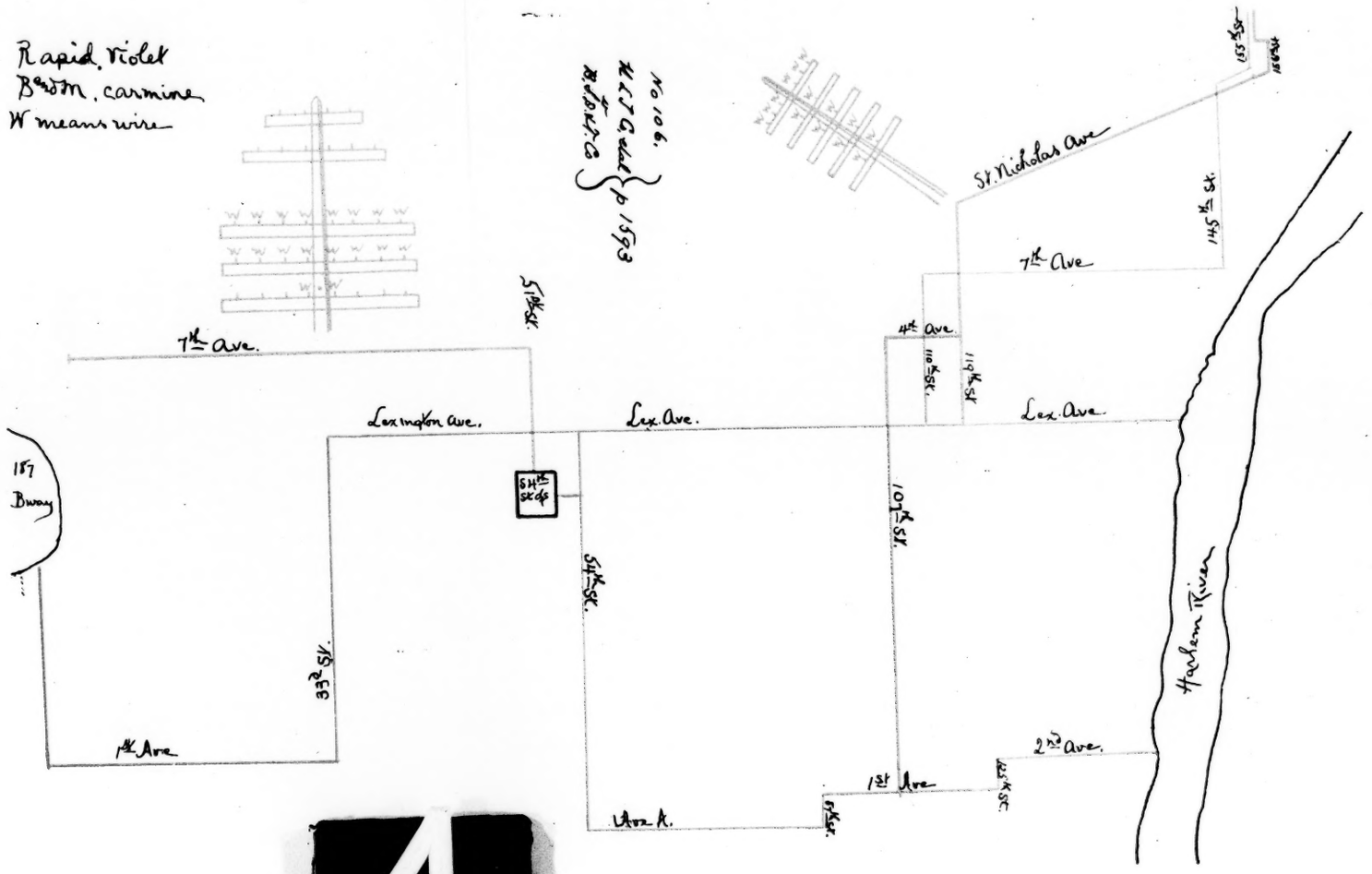
Rapid, violet
Bend M, carmine
W means wire
No 106.
H L J Co. etal
B.J.D.K.T. Co
p 1593
St. Nicholas Ave
155th St
145th St.
7th Ave
4th Ave.
110th St.
119th St
Lex. Ave
Lexington Ave.
Lex. Ave.
51st St.
54th St
107th St.
54th St.
33d St.
187 Bway
1st Ave
2nd Ave.
1st Ave
125th St.
Ave A.
Harlem River

4